89-328

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No. 89 -

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**A.O. SMITH HARVESTORE PRODUCTS, INC., HERMITAGE HARVESTORE SYSTEMS, INC., and CHUCK DOWDY,**

*Petitioners,*

v.

**JAMES D. SAYLOR and KAAREN SAYLOR d/b/a UDDER NONSENSE DAIRY,**

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED

This case was tried twice, once in 1985, and again in 1987 on remand following reversal of the judgment in the first trial. Because of potential prejudice, the district judge instructed all parties, counsel, and witnesses at the second trial to refrain from informing the jury of the first trial. However, during a postverdict judicial inquiry of the jurors, the Petitioners established that a trial spectator, who was a relative of one of the witnesses that testified for Respondents, told a juror during a trial recess that the case had been previously tried two years earlier.

The questions presented for review are:

1. Whether, having established that an extraneous communication relating to the first trial was made to one of the jurors, the Petitioners were entitled to the rebuttable presumption of prejudice established in *Remmer v. United States*, 347 U.S. 227 (1954), and applied by the majority of the circuit courts, or were required to prove actual prejudice in accordance with the Sixth Circuit's minority view that *Smith v. Phillips*, 455 U.S. 209 (1982), a case involving juror bias, effectively overruled the *Remmer* presumption of prejudice in all juror misconduct cases.[1]

2. Whether, contrary to decisions by other circuits, the trial judge was permitted under Rule 606(b) of the Federal Rules of Evidence prohibiting intrusion into the jury's mental processes, to inquire of the jurors whether the extraneous communication had an "effect" on their verdict as the Sixth Circuit held.

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[1] If the Petition is granted, Petitioners will also argue that the Respondents did not rebut the presumption of prejudice by showing that the extraneous communication was harmless.

## PARTIES TO THE PROCEEDING AND RULE 28.1 LISTING

Petitioners are A.O. Smith Harvestore Products, Inc., Hermitage Harvestore Systems, Inc., and Chuck Dowdy. Respondents are James D. Saylor and Kaaren Saylor d/b/a Udder Nonsense Dairy.

A.O. Smith Harvestore Products, Inc.'s subsidiaries are Sceptor Finance Company Inc. and 4-J Harvestore Systems, Inc. A.O. Smith Harvestore Products, Inc.'s corporate parent is A.O. Smith Corporation, a publicly held company traded on the American Stock Exchange. Subsidiaries and affiliates of A.O. Smith Corporation are:

A.O. Smith Electric Motors (Ireland) Ltd.
A.O. Smith Enterprises Ltd.
AgriStor Credit Corporation
AgriStor Credit Corporation of Canada Ltd.
Claymore Insurance Company, Ltd.
Fabricadores de Componentes de Motores S.A. De C.V.
Fabricantes de Componentes de Motrices S.A. De C.V.
Fabricantes de Motores de Mexico S.A. De C.V.
Motores Electricos de Juarez S.A. De C.V.
Productos de Aqua S.A. De C.V.
Productos Electricos Aplicados S.A. De C.V.
Smith Fiberglass Products Inc.
Metalsa S.A.
A.O. Smith Water Products Company B.V.
A.O. Smith L'Eau Chaude, Sarl
AOS Holding Company
A.O. Smith Holdings (Ireland) Ltd.
A.O. Smith International Trading Co.
Smith Investment Company

Hermitage Harvestore Systems, Inc. has no corporate parent, affiliates or subsidiaries.

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**JAMES D. SAYLOR and KAAREN SAYLOR d/b/a UDDER NONSENSE DAIRY,**

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, A.O. Smith Harvestore Products, Inc., Hermitage Harvestore Systems, Inc., and Chuck Dowdy, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered April 26, 1989.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is contained in the Appendix at App. 1.[2] The order entered by the District Court for the Eastern District of Tennessee is contained in the Appendix at App. 19.

## JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1989.[3] By order of July 10, 1989, the Court of Appeals denied Petitioners' timely petition for rehearing with suggestion for rehearing en banc. (App. 17). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## STATUTORY PROVISION INVOLVED

Rule 606(b) of the Federal Rules of Evidence provides as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of

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[2] Pursuant to Rule 24 of the Court of Appeals for the Sixth Circuit, the opinion was not recommended for publication. The fact that the Court of Appeals recommended that the opinion not be published, however, is not a bar to this Court's review. *See, e.g., Transamerican Freight Lines v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 34 (1975).

[3] The Sixth Circuit remanded the case for a new trial on the issue of damages unless the Respondents accepted a remittitur of $350,000. (App. 16). Absent review by this Court, however, there will not be a third trial since on May 25, 1989, Respondents filed a motion in the District Court reflecting their acceptance of a remittitur of $350,000. The issuance of the mandate was stayed by the Sixth Circuit pending the filing of this Petition.

> anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b).

## STATEMENT OF THE CASE

The issues presented for review involve a conflict in the circuits regarding the presumption of prejudice afforded a party in a postverdict hearing once it is established that an extraneous and potentially prejudical communication was made to a juror. In particular, the circuits are divided with respect to whether this Court's decision in *Smith v. Phillips*, 455 U.S. 209 (1982), a case involving alleged juror bias, abolished the presumption of prejudice established in *Remmer v. United States*, 347 U.S. 227 (1954), a case involving an extraneous communication to a juror.

The issues in this case arise as the result of a judicial inquiry which was conducted several months after the second trial in which the jury rendered a verdict against Petitioners in the sum of $1,365,000. The first trial had also resulted in a substantial verdict against the Petitioners but the Sixth Circuit reversed and ordered a new trial. *Agristor Leasing v. Saylor*, 803 F.2d 1401 (6th Cir. 1986). Prior to the commencement of the second trial the

District Court granted Petitioners' motion in limine directing counsel and witnesses to refrain from making any references to the existence of the first trial in the presence of the jury.[4] Despite this precaution, however, the jury learned of the first trial through a trial spectator, who was a relative of one of the witnesses for the Respondents and a plaintiff in another action against the Petitioners. (JA 87). Thus, the judicial inquiry was convened for the purpose of determining the circumstances of that interested spectator's communication to the juror. At the inquiry each of the jurors was individually questioned about the communication by the trial judge in the presence of counsel for all parties, and the following testimony was elicited.

During a trial recess the spectator approached one of the jurors, whom she had known many years earlier, in the women's restroom and told her "we sat through this whole case two years ago." (JA 520-21, 556-59, 562). Before the spectator could say more, the juror informed her that she was not supposed to discuss the case and left the restroom. (JA 560). Upset by the incident, the juror reported the incident to the marshal. (JA 521).[5] The other

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[4] Specifically, the trial judge warned as follows:

> Yes, I don't want that done at all by anybody. It's not proper, and there is absolutely no proper—the way it was tried before has nothing at all to do with what the judgment should be of this jury now, and we all—I am telling everybody to prevent that from happening at all cost ....

(JA 437) ("JA" citations are to the Joint Appendix (two volumes) submitted by the parties to the Sixth Circuit. For the Court's convenience, a set of the Joint Appendix was transmitted herewith and lodged with the Clerk of the Court.).

[5] Although the District Court and the parties learned of the incident during the trial, Petitioners did not at that time know that the spectator who made the contact was more than a bystander

(Footnote continued on following page)

jurors' testimony is inconsistent with respect to whether and what they were told of the incident. (JA 512, 527, 539).[6]

At the conclusion of the judicial inquiry, and over the Petitioners' objection, the District Court addressed the following question to the jurors, as a group:

> On the verdict that you returned here in this case when you were jurors, did you decide it on the evidence that you heard in this courtroom and on the law that the Court gave you and on nothing else? If you did that, raise your right hand.

(JA 567). All jurors raised their hands.

The Petitioners then filed a motion for new trial pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, arguing that because the jury learned of the first trial they had been prejudiced and did not receive a fair trial.[7] Refusing to give the Petitioners the benefit of the

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[5] *continued*
and that she was related to a witness in the case who was also a plaintiff in a similar action. (JA 87). Accordingly, consistent with relevant authorities, the District Court and Court of Appeals both rejected Respondents' arguments that Petitioners waived their right to argue that they were entitled to a new trial as a result of the outside contact with the jury. *See, e.g., United States v. Moten*, 582 F.2d 654 (2d Cir. 1978).

[6] Included in the Petition's Appendix is a chart which summarizes the testimony of the jurors at the judicial inquiry and graphically illustrates the inconsistencies and discrepancies among their answers. (App. 20).

[7] Although the second trial lasted over two weeks and thirty witnesses testified, including ten experts on a myriad of complicated subjects such as engineering, veterinary science, and animal nutrition, the jury took barely two hours to return a verdict in favor of the Respondents for $875,000 in compensatory damages and prejudgment interest of $490,000. (JA 43, 488-90).

rebuttable presumption of prejudice established by this Court in *Remmer v. United States*, 347 U.S. 227 (1954), the District Court denied the motion for a new trial. Relying upon the jurors' assurances that they decided the case solely on the evidence, the district judge concluded that there was "no juror misconduct, that any contact which occurred was harmless, and that all jurors exhibited exemplary behavior at all times." (App. 19).

On appeal, the Sixth Circuit affirmed, holding that *Remmer* was not "controlling law," because it was "superseded" by *Smith v. Phillips*, 455 U.S. 209 (1982). (App. 11). *Phillips*, as earlier interpreted by the Sixth Circuit in *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985), requires a showing of actual prejudice by the movant, as opposed to permitting a rebuttable presumption of prejudice once the outside communication is established. (App. 11-12). The Sixth Circuit's analysis and construction of *Phillips* as "superseding" *Remmer* is directly contrary to the following Courts of Appeals, each of which has expressly criticized and/or rejected *Pennell*'s interpretation of *Phillips* and *Remmer*:

| | |
|---|---|
| Fourth: | *see, e.g., Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535-37 (4th Cir. 1986); |
| Ninth: | *see, e.g., United States v. Littlefield*, 752 F.2d 1429, 1431-32 (9th Cir. 1985); |
| District of Columbia: | *see, e.g., United States v. Butler*, 822 F.2d 1191, 1195 (D.C. Cir. 1987). |

In addition, without specifically addressing the Sixth Circuit's position, the Courts of Appeal for the Second, Seventh, Eighth, Tenth and Eleventh Circuits, have con-

tinued to apply the *Remmer* presumption of prejudice since the time *Phillips* was decided.[8]

In its opinion, the Sixth Circuit also expressly rejected Petitioners' argument that *Pennell* and *Phillips* are limited to situations where the hearing on the issue of the outside juror contact occurs *before* the jury renders its verdict, and do not apply to a postverdict hearing as was the case here. (App. 12). The Sixth Circuit instead held that Rule 606(b) of the Federal Rules of Evidence does not prohibit postverdict questioning of jurors regarding the effect of an outside communication on their verdict. (App. 12-13). This position is in direct conflict with all of the other courts of appeals which have considered the issue.[9]

Recognizing that the Sixth Circuit's internal rules prohibited the panel which decided this case from overruling a prior panel's decision in *Pennell*, Petitioners filed a petition for rehearing en banc. The petition was denied with no judge voting in favor of an en banc rehearing. (App. 17).

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[8] *See, e.g., United States v. Wiley*, 846 F.2d 150, 157-58 (2d Cir. 1988); *DeGrave v. United States*, 820 F.2d 870, 872 (7th Cir. 1987); *United States v. Robinson*, 756 F.2d 56, 59 (8th Cir. 1985); *United States v. Hornung*, 848 F.2d 1040, 1043-46 (10th Cir. 1988); *United States v. Caporale*, 806 F.2d 1487, 1503 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 (1987).

[9] *See, e.g., United States v. Jonnet*, 762 F.2d 16, 19-20 (3d Cir. 1985); *United States v. Delaney*, 732 F.2d 639, 643 n.6 (8th Cir. 1984); *Wiedemann v. Galiano*, 722 F.2d 335, 337 (7th Cir. 1983); *United States v. Brooks*, 677 F.2d 907, 913 (D.C. Cir. 1982); *United States v. Bagnariol*, 665 F.2d 877, 884-85 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982); *United States v. Greer*, 620 F.2d 1383, 1389 (10th Cir. 1980).

## REASONS FOR GRANTING THE WRIT

### I. Summary Of Reasons

The resolution of the issues presented in this Petition transcends this particular case and impacts the essence of our system of jurisprudence in criminal and civil litigation alike. As this Court observed in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984):

> One touchstone of a fair trial is an impartial trier of fact—"a jury capable and willing to decide the case solely on the evidence before it."

*Id.* at 554 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). *See also Mattox v. United States*, 146 U.S. 140, 150 (1892) ("Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.").

An equally inviolate principle is the prohibition against courts and litigants inquiring into the jurors' deliberative processes.[10] That principle was codified in Rule 606(b) of the Federal Rules of Evidence which expressly prohibits inquiries into "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that . . . or concerning the juror's mental processes in connection therewith." Fed. R. Evid. 606(b).

A dilemma, however, is created by the interaction between these two principles when a hearing regarding a possible extraneous communication with the jury is conducted *after* the jury has rendered its verdict, since it

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[10] *See Tanner v. United States*, 107 S. Ct. 2739, 2745-48 (1987); *Mattox v. United States*, 146 U.S. 140, 149 (1892).

may be difficult if not impossible to learn whether the verdict was affected by the extraneous contact without violating the prohibition against invading the jurors' mental processes. Thus, a choice must be made between countervailing policy considerations. On the one hand, truth and a fair trial to all litigants, an overriding goal of the judicial system, must be balanced against policy considerations on the other hand which underlie the prohibition against inquiring into the reasons for the verdict. Those include ensuring the finality of jury verdicts, protecting the integrity of the judicial process, discouraging jury harassment, as well as conserving judicial resources by avoiding lengthy or unnecessary proceedings on juror misconduct issues.

In *Remmer*, this Court resolved the tension between these considerations by adopting the so-called rebuttable presumption of prejudice—a direct or indirect communication or contact with the jury about a matter relating to the trial is deemed "presumptively prejudicial," unless the Government proves that the contact was harmless. 347 U.S. at 229.[11] The Sixth Circuit, however, in contrast to the other circuits, construes this Court's subsequent decision in *Phillips*, as having effectively overruled *Remmer* by eliminating the presumption of prejudice notwithstanding the fact that the juror misconduct in *Phillips* involved juror bias, not an extraneous communication. In doing so,

[11] Although *Remmer* was a criminal case, the presumption of prejudice established in that case has been uniformly applied in civil litigation as well. *See Krause v. Rhodes*, 570 F.2d 563, 568 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978); *Hobson v. Wilson*, 737 F.2d 1, 47-48 (D.C. Cir. 1984). *See, e.g., Abell v. Potomac Insurance Co.*, 858 F.2d 1104 (5th Cir. 1988); *Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484 (4th Cir.), *cert. denied*, 109 S. Ct. 564 (1988); *Rinker v. County of Napa*, 724 F.2d 1352 (9th Cir. 1983).

the Sixth Circuit has not only made it virtually impossible for a party to ever establish that an extraneous communication denied it a fair trial, but has sacrificed the objectives sought to be achieved by Rule 606(b)'s prohibition against inquiring into the jurors' mental processes. As observed by one commentator, such postverdict inquiries of jurors pose particular problems:

> The jurors now have a substantial self-interest in providing testimony that is consistent with the validity of their verdict. They have taken a public position on the issue and may be reluctant to provide testimony that they may have acted improperly in arriving at that position.

Thompson, *Challenge To The Decisionmaking Process—Federal Rule Of Evidence 606(b) & The Constitutional Right To A Fair Trial*, 38 Sw. L.J. 1187, 1218 (1985).[12]

The conflict between circuits created by the Sixth Circuit's position presents important considerations for this Court. First, the issues are not isolated but are occurring and promise to reoccur in both criminal and civil contexts. Second, further development by future decisions in other circuits is unlikely to cause the Sixth Circuit to yield in

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[12] *Accord McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 558 (1984) (Brennan, J., concurring) ("the bias of a juror will rarely be admitted by the juror himself"); *Smith v. Phillips*, 455 U.S. 207, 231-32 (1982) (Marshall, J., dissenting) ("It is the nature of the practices here challenged that proof of actual harm, or lack of harm is virtually impossible to adduce.") (quoting *Peters v. Kiff*, 407 U.S. 493, 504 (1972)); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (Court observed that despite a juror's sincerity when he says he can be fair, the "psychological impact requiring such a declaration before one's fellows is often its father."). *See also United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) (jurors' denials are an insufficient basis on which to overcome presumption of prejudice); *Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983) (juror's affidavit stating that she was not affected by the contact did not rebut presumption of prejudice).

its minority interpretation in light of its refusal to do so to date in the face of explicit criticism by courts and commentators[13] and its several recent decisions reaffirming its position.[14]

Accordingly, to avoid a continuation of inconsistent applications and interpretations of *Remmer*, *Phillips*, and Rule 606(b) in lower court decisions affecting substantial numbers of criminal and civil litigants, this Court should grant review of this case to determine: (1) whether the Sixth Circuit erred in holding that Petitioners were not entitled to the *Remmer* presumption of prejudice once they established that the extraneous communication about the prior trial was made to one of the jurors, and (2) whether the trial judge violated Rule 606(b) when it inquired of the jurors not only about the extraneous communication itself but also its effect on their verdict.

## II. The Sixth Circuit's Decision Is In Direct Conflict With Decisions Of Other Circuits

The Sixth Circuit squarely acknowledged that "if *Remmer* were controlling law, the burden would have been on the [Respondents] to establish lack of prejudice from the unauthorized contact." (App. 11). But the Court of Appeals continued to follow its decision in *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985), where it held:

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[13] *See, e.g., United States v. Littlefield*, 752 F.2d 1429, 1431 (9th Cir. 1985). *See* Note, *Clean Sweep of the New Trial Safeguard Against Prejudice From Unauthorized Communications With Jury Members*, 31 Wayne L. Rev. 1083, 1096-1100 (1985).

[14] *See, e.g., United States v. Cooper*, 868 F.2d 1505, 1523 (6th Cir. 1989); *United States v. Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988); *United States v. Crane*, No. 86-3917, slip op. (6th Cir. Feb. 18, 1988).

> In light of *Phillips*, the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed.

*Id.* at 532. Similarly, in *United States v. Zelinka*, 862 F.2d 92 (6th Cir. 1988), cited and relied upon in the decision in this case (App. 12), the Sixth Circuit reaffirmed its view that *Pennell* controls, expressly observing that:

> This court has consistently held that *Smith v. Phillips* reinterpreted *Remmer* to shift the burden of showing bias to the defendant rather than placing a heavy burden on the government to show that an unauthorized contact was harmless.

*Id.* at 95. Significantly, the Sixth Circuit has not charted its own course oblivious to the fact that its interpretation and application of *Phillips* differs from decisions by other courts of appeals. In *Zelinka*, for example, the Sixth Circuit acknowledged that two courts of appeals had expressly disagreed with *Pennell* and still others continue to apply the *Remmer* presumption. *Id.*[15]

What the Sixth Circuit ignored in *Zelinka*, however, and expressly disavowed in this case, is the critical distinction between preverdict and postverdict inquiries regarding juror misconduct. (App. 12-13). As Petitioners argued below and as all of the other circuits which have addressed the issue recognize, the actual bias test dis-

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[15] The Sixth Circuit also believed, however, that the First Circuit agreed with its position. 862 F.2d at 95 (citing *Neron v. Tierney*, 841 F.2d 1197, 1200 (1st Cir. 1988), and *United States v. DeLutis*, 722 F.2d 902, 909 (1st Cir. 1983)). But *Neron* and *DeLutis*, like *Phillips*, involved issues of potential juror bias, not potential prejudice as a result of an extraneous communication, like the situation here and in *Remmer*.

cussed in *Phillips* cannot be applied in a federal postverdict hearing because it would typically result in a violation of Rule 606(b) in order to satisfy the test. *See, e.g., Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535-36 n.5 (4th Cir. 1986) ("proof of 'actual' prejudice would have been impossible to uncover in this case without contravening Federal Rule of Evidence 606(b)"); *Owen v. Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984) ("A determination of jury prejudice is complicated in the federal courts by the proscription against questioning jurors directly about the effect of the outside contact on their deliberations. Fed. R. Evid. 606(b)."); *United States v. Greer*, 620 F.2d 1383 (10th Cir. 1980) ("The effect of [Rule 606(b)] is that a presumption of prejudice cannot be overcome once a jury has reached its verdict."). *See also Attridge v. Cencorp Division of Dover Technologies Int'l, Inc.*, 836 F.2d 113 (2d Cir. 1987).[16]

This Court was not required to consider the effect of Rule 606(b) on a litigant's rights in a postverdict hearing regarding juror misconduct in *Phillips*. *Phillips* involved a petition for writ of habeas corpus, seeking relief from

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[16] In addition to the distinction between a preverdict and postverdict hearing, this Court's decision in *Phillips* involved juror bias, not an extraneous communication with jurors. The Fourth Circuit, for example, has found *Phillips* inapplicable to extraneous communication cases, explaining as follows:

> *Phillips* and all of our cases following it are distinguishable from the present case because they address intrinsic juror bias subject to revelation during voir dire. . . . We see a basic difference between the beliefs, feelings, preferences and general personality traits that every juror carries into the courtroom and the power of after-acquired extraneous information . . . to infect and extirpate impartiality from the fact-finding process.

*Haley*, 802 F.2d at 1536 n.5. Indeed, in *Phillips* this Court expressly observed that voir dire, though not infallible, is a safeguard of juror impartiality. 455 U.S. at 217.

a state court conviction because of alleged juror bias. Significantly, in *Phillips* the postverdict inquiry regarding the alleged juror bias was conducted in state court. 455 U.S. at 217. Thus, Rule 606(b) was not implicated in *Phillips* because the state court findings of fact are "presumptively correct" and the legal issue in the habeas context was restricted to whether the state court provided the petitioner with an *opportunity* to prove prejudice consistent with due process. *See Neron v. Tierney*, 841 F.2d 1197, 1199 (1st Cir.), *cert. denied*, 109 S. Ct. 90 (1988) ("Section 2254(d)(2) does not allow us to superimpose federal choices upon the state courts merely because we think some 'other' procedure might have been 'better'.").

In stark contrast to the state court proceeding at issue in *Phillips*, there is no question that Rule 606(b) applied to the judicial inquiry in this case.[17] Thus, *Phillips* cannot provide support for the Sixth Circuit's approval of the trial judge's flagrant violation of Rule 606(b). Rather,

[17] In fact, in overruling Petitioners' objection to the question, the District Court commented as follows:

> THE COURT: . . . I'm going to do what you tell me I shouldn't do on 606. I'm going to bring all six jurors in here and ask them if their verdict was a verdict that they found under all of the evidence and the law I instructed them, and if I shouldn't do that, then the Sixth Circuit will say it was error for me to do it and I've exercised myself for nothing.
>
> * * *
>
> THE COURT: I'm fixing to ask these six jurors did they decide this case on the evidence they heard in this courtroom and on the law that I gave them and nothing else, and I want to know what their answer is and if it's error, then we'll strike it from the record as though it didn't happen and you can correct the error when you get up to the Sixth Circuit, but if I don't ask it they may send it back for me to ask them.

(JA 554, 566).

the only rationale offered is the Sixth Circuit's misapprehension of the Rule's so-called extraneous prejudicial information exception. That exception expressly exempts from the Rule's general prohibition "a juror['s testimony] on the question [of] whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Fed. R. Evid. 606(b). At first glance, this exception might suggest, as the Sixth Circuit has decided, that when testifying about extraneous information a juror can also be questioned about the effect of that information on the jury's deliberations. That construction, however, cannot be reconciled with an examination of the legislative history, case law or legal commentary.[18]

Moreover, the Sixth Circuit's application of Rule 606(b)'s extraneous information exception is, like its interpretation of *Phillips*, in direct conflict with other circuits. *See Wiedemann v. Galiano*, 722 F.2d 335, 337 (7th Cir. 1983) ("The Rule [606(b)] does allow jurors to testify as to whether extraneous information or an outside influence reached them. However, it prohibits jurors from giving post-verdict testimony as to whether their deliberations, in fact, were prejudiced by the extraneous information or outside influence."); *United States v. Bagnariol*, 665 F.2d 877, 884-85 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982) ("[Jurors] may not be questioned about the deliberative process or subjective effects of extraneous information, nor can such information be considered by the trial or appellate courts."); *United States v. Bassler*, 651 F.2d 600,

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[18] *See, e.g., Tanner v. United States*, 107 S. Ct. 2739 (1987); *Federal Rules Of Evidence: Hearings On H.R. 5463 Before The Committee On The Judiciary*, 93d Cong., 2d Sess. (1974); Note, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, And Juror Responsibility*, 98 Yale L.J. 187 (1988).

603 (8th Cir.), *cert. denied*, 454 U.S. 944 (1981) ("Rule 606(b) precludes the district court from investigating the subjective effects of any extrinsic material on the jurors . . ."). *Accord United States v. Jonnet*, 762 F.2d 16, 19 (3d Cir. 1985); *United States v. Delaney*, 732 F.2d 639, 643 n.6 (8th Cir. 1984); *United States v. Brooks*, 677 F.2d 907, 913 (D.C. Cir. 1982).

Without addressing the conflicting decisions of other circuits and without citation of any authority supporting its position, the Sixth Circuit attempted to rationalize its holding as follows:

> Presumably, under the *Remmer* rule, the party seeking to preserve the judgment would be allowed to demonstrate the *absence* of prejudice by questioning the jurors, post-verdict, under the authority of the Rule 606(b) exception. However, the defendants assert that the post-verdict questioning of jurors to establish the *existence* of prejudice under the *Phillips/Pennell* rule would violate Rule 606(b). Plainly, if post-verdict questioning of jurors was permissible when the *Remmer* presumption was applicable, such post-verdict questioning is permissible under *Phillips* and *Pennell*.

(App. 12-13) (emphasis original). This statement reflects two fundamental errors. First, it ignores the crucial distinction between questioning jurors about the *fact* of the extraneous communication and questioning them about the *effect* of the extraneous communication on their deliberations. Second, the Sixth Circuit seemingly believes that it is permissible to question jurors in order to establish the *absence* of prejudice.[19]

[19] The Sixth Circuit also erroneously assumed that questioning the jurors about the effect of the communication on their verdict

(Footnote continued on following page)

As the result of these errors, the Sixth Circuit's application of Rule 606(b) stands in sharp and irreconcilable conflict with other circuits which have held that an inquiry into jurors' mental processes is prohibited by Rule 606(b) irrespective of whether the result confirms or impeaches their verdict. *See, e.g., United States v. Bassler*, 651 F.2d 600, 603 (8th Cir. 1981); *United States v. Greer*, 620 F.2d 1383, 1389 (10th Cir. 1980). *Accord United States v. Jelsma*, 630 F.2d 778, 779 (10th Cir. 1980). *See also* 3 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶606[04] at 606-29-30 (1988).

In the final analysis, there is no question that Petitioners would have been entitled to a new trial had the *Remmer* presumption of prejudice test been applied in this case. There is likewise no question that a new trial would have followed had the courts below not considered the jurors' affirmative responses to the trial judge's question with respect to whether their verdict was based solely on the evidence admitted at trial. In fact, had the Respondents' dairy farm in this case been located just 50 to 70 miles south, in Alabama or Georgia instead of Tennessee, the result would not have been the same. Rather, under Eleventh Circuit precedent, the *Remmer* presumption would have been available to the Petitioners and the judge would not have been permitted to ask the

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[19] *continued*

would have been permissible under *Remmer*, which was decided before Rule 606(b) was enacted. However, limiting the inquiry of jurors to the fact of an extraneous communication and not its impact, if any, on the verdict, is also supported by the common law rule which preceded the adoption of the Federal Rules of Evidence. *See, e.g., Tanner v. United States*, 107 S. Ct. 2739, 2745-48 (1987); *Mattox v. United States*, 146 U.S. 140, 149 (1892). *See generally* 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶606[03] (1988).

question regarding the jury's deliberative process. *See United States v. Heller*, 785 F.2d 1524, 1528 (11th Cir. 1986). Hence, a new trial would have been mandated. It is submitted that such disparate results in the federal courts relating to the fundamental right of a fair trial should be predicated on more than geography.

## III. The Issues Presented Are Important To Civil and Criminal Litigants And The Judiciary

The issues presented in this Petition are being confronted by federal courts throughout the country on a regular basis. The importance of a fair trial decided by jurors free from extraneous contacts and communications that may be prejudicial is obvious. Likewise, little need be said about the importance of protecting the sanctity of the jury room and the secrecy of the jurors' deliberations. Those goals not only provide the underpinnings to Rule 606(b), but have been steadfastly followed since the time of Lord Mansfield.[20] Acknowledging the importance of the policies affected by these issues, however, is far easier than resolving them since their resolution necessarily involves balancing equally laudable and competing policies.[21]

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[20] *See Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785). *See generally* Crump, *Jury Misconduct, Jury Interviews, And The Federal Rules Of Evidence: Is The Broad Exclusionary Principle Of Rule 606(b) Justified?*, 66 N. Car. L. Rev. 509, 513-20 (1988); Thompson, *supra* p. 10, at 1189-95.

[21] One commentator aptly observed that:

> The attempt to effectuate significant policy considerations affecting vital substantive rights by rules of competency [Rule 606(b)] is like trying to eat soup with a fork. Although by proper manipulation some nourishment can be supplied, the process is hit or miss with substantial and unacceptable side effects.

Thompson, *supra* p. 10, at 1221-22. *See also* Note, *supra* note 18, at 187 ("Rule 606(b) seems designed to maximize tension between preserving the jury and preserving justice.").

The resolution reached by the majority of the circuits is that the price to be paid in order to preserve the integrity of the jury system is a lessening of the finality of jury verdicts and a potential increase in posttrial litigation.[22] The Sixth Circuit, on the other hand, is resolutely unwilling to pay that price and requires proof of actual prejudice even at the expense of invading the jurors' mental processes.

In addition, other circuits have not yet directly confronted the issue of juror misconduct in a postverdict setting and/or will be faced with a choice between these conflicting approaches.[23] Alternatively, absent guidance from this Court, these circuits may opt for their own variation of the required balancing of the competing public policies.[24]

In sum, this Court's decision in *Phillips* is being inconsistently interpreted and applied in cases involving juror bias,[25] juror statements on voir dire,[26] extraneous com-

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[22] *See* cases cited at page 6 and note 8, *supra*.

[23] The First and Third Circuits have not yet decided the issue in an extraneous communication setting. And, the Fifth Circuit expressly refused to decide the issue in a case where the extraneous communication was caused by the defendant himself. *See Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1147 (5th Cir. 1988).

[24] Congress, the only other alternative to a resolution of this conflict, is not particularly well suited to dealing with these issues. A clarifying amendment, for example, of Rule 606(b) would not be sufficient. Although such an amendment would prevent future invasions of jurors' mental processes regarding extraneous communications, it would not, without more, reinstate the *Remmer* rebuttable presumption in the Sixth Circuit and any other circuits which may adopt its interpretation of *Phillips*.

[25] *See, e.g., United States v. Kabir*, Nos. 87-3850/3851, slip op. (6th Cir. Dec. 28, 1988), *cert. denied*, 109 S. Ct. 1325 (1989).

[26] *See, e.g., Neron v. Tierney*, 841 F.2d 1197 (1st Cir.), *cert. denied*, 109 S. Ct. 90 (1988); *Baca v. Sullivan*, 821 F.2d 1480 (10th Cir. 1987).

munications[27] in circumstances involving both preverdict[28] and postverdict[29] hearings. Yet, in *Phillips* all this Court had before it was an issue of juror bias in the context of a habeas proceeding where the hearing had been conducted in state court so that Rule 606(b) was not applicable. As a result, seven years later, clarification of the rule in *Phillips* is now required, as well as guidance regarding the appropriate presumptions and burdens of proof in federal postverdict judicial inquiries involving incidents of potential juror misconduct. This case affords the Court with the opportunity to provide the requisite guidance and clarification.

## CONCLUSION

For the foregoing reasons, this Petition For Writ Of Certiorari should be granted.

Dated: August 25, 1989

Respectfully submitted,

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[27] *See, e.g., United States v. Zelinka*, 862 F.2d 92 (6th Cir. 1988); *United States v. Ramos*, 861 F.2d 461 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1353 (1989).

[28] *See, e.g., United States v. Crane*, No. 86-3917, slip op. (6th Cir. Feb. 18, 1988); *United States v. Williams*, 822 F.2d 1174 (D.C. Cir. 1987).

[29] *See, e.g., United States v. Kabir*, Nos. 87-3850/3851, slip op. (6th Cir. Dec. 28, 1988), *cert. denied*, 109 S. Ct. 1325 (1989).

# APPENDIX

[Filed April 26, 1989]

Nos. 87-5990/6002
88-5279/5314

# UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JAMES SAYLOR and KAAREN SAYLOR d/b/a UDDER NONSENSE DAIRY,

Defendants, Counterplaintiffs-Third-Party Plaintiffs-Appellees,

v.

A. O. SMITH HARVESTORE PRODUCTS, INC., (87-5990/88-5279); HERMITAGE HARVESTORE SYSTEMS, INC., and CHUCK DOWDY (87-6002/88-5314),

Third-Party Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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BEFORE: KEITH, JONES and GUY, Circuit Judges.

PER CURIAM. The third-party defendants appeal the jury verdict for the third-party plaintiffs, including the pre-judgment interest award, in this diversity action for strict product liability and fraudulent misrepresentation.

For the reasons that follow, we affirm the district court's judgment as to the liability and compensatory damages issues. However, because the record reflects that the prejudgment interest award was improperly calculated, we find it necessary to order a remittitur of a portion of that award.

I.

At all times relevant to this lawsuit, the third-party plaintiffs-appellees, James and Kaaren Saylor ("the Saylors") were the owners and operators of the "Udder Nonsense Dairy" in New Bedford County, Tennessee. Third-party defendant-appellant, A.O. Smith Harvestore Products, Inc. ("AOSHPI"), is a New York corporation engaged in the design and manufacture of farm feed storage systems. Third-party defendant-appellant Hermitage Harvestore Products, Inc. ("Hermitage") is a Tennessee corporation engaged in the business of selling and distributing Harvestore systems designed and manufactured by AOSHPI. Third-party defendant-appellant Chuck Dowdy ("Dowdy") is a sales agent for Hermitage.

In January or February of 1980, the Saylors were approached by Dowdy about purchasing Harvestore feed storage structures and related equipment manufactured by AOSHPI for use on their dairy farm. The Harvestore system was represented through AOSHPI literature and by Dowdy as an "oxygen limiting" system which was designed to keep stored feed virtually airtight, thereby preventing spoilage and yielding better feed and increased milk production. Dowdy showed the Saylors an AOSHPI film and a book published by AOSHPI, both of which touted the oxygen limiting capabilities of Harvestore structures. The promotional material defined "oxygen limiting"

as "[a] feed storage system in which ensiled feeds are protected from the access of oxygen."

In March of 1980, the Saylors signed an agreement with Hermitage to obtain the Harvestore system. In May of 1980, the Saylors entered a long-term lease with AgriStor Leasing Company ("AgriStor"), which financed the arrangement. The Harvestore structures were in place and operating on the Saylors' farm by July of 1980. After the first month, however, James Saylor began noticing problems in the dairy herd, including decreased milk production, a lack of energy in the cows, and swelling in their joints.

During 1981 several veterinarians came to the Saylors' farm and examined the dairy herd; however, none of them could determine the source of the problem. Although the Saylors stopped using the Harvestore structures in February of 1982, the health of the herd continued to decline, resulting in lower milk productivity and the death of a number of cows. Eventually, the Saylors were forced to slaughter the dairy herd and close down their farm. When they defaulted on their lease payments, AgriStor repossessed the equipment.

On October 28, 1983, AgriStor filed suit against the Saylors in the United States District Court for the Eastern District of Tennessee, seeking the balance due under the lease. The Saylors answered and filed a third-party complaint against Dowdy, Hermitage and AOSHPI, seeking damages for manufacturing a defective product, and for false and fraudulent misrepresentations about the product. At the beginning of the trial, the Saylors confessed judgment on the AgriStor claim, and the district court granted summary judgment to AgriStor for the remaining payments under the lease. The case was tried to a jury on the Saylors' claims of a defective product and fraudulent

misrepresentation. The jury found the defendants jointly and severally liable to the Saylors, and awarded compensatory and punitive damages in the amount of $1 million.

The defendants appealed the judgment to this court, arguing that the district court had erred in refusing to give a jury instruction on the statute of limitations, and in refusing to direct a verdict in defendants' favor on the fraudulent misrepresentation claims. Regarding the latter issue, the defendants argued that certain language in the lease agreement expressly disclaimed that the Saylors had relied upon any representations made by the defendants in purchasing the Harvestore equipment. The defendants contended that this contractual language precluded the Saylors from proving reliance, thereby foreclosing their fraudulent misrepresentation claims.

This court reversed the district court's judgment and remanded, agreeing with the defendants that the jury should have been instructed on the statute of limitations issue. *Agristor Leasing v. James Saylor*, 803 F.2d 1401, 1405-06 (6th Cir. 1986) ("*Saylor I*"). However, we rejected the defendants' assertions regarding the force of the "disclaimer-of-reliance" language in the contract. Noting a split of authority in Tennessee as to whether such disclaimers were effective to shield a defendant from liability for fraud, this court deferred to the district judge's interpretation of state law and concluded that "the district court did not err in denying summary judgment and a directed verdict on the basis of the disclaimers of reliance." *Id.* at 1407.

On remand, the defendants filed a motion *in limine* seeking to prevent any reference to the prior proceedings in the presence of the jury. This motion was granted. In addition, the defendants sought to preclude the Saylors from presenting evidence regarding pre-judgment interest

damages. The district court ultimately granted this motion, stating that if the jury awarded compensatory damages, the *court* would decide whether pre-judgment interest should be awarded and in what amount.

The second trial commenced on June 8, 1987. In the second week of trial, during a brief recess in the proceedings, one of the jurors was approached by an old acquaintance who was a spectator at the trial. The spectator, who was a blood relative of one of the Saylors' expert witnesses, greeted the juror in the restroom and told the juror that she had "sat through this whole case two years ago." The juror promptly told the spectator that she was not allowed to talk about the case and walked out of the restroom. The juror then informed the court marshal about what had taken place, and the marshal informed the court and counsel for the parties. Counsel for the defendants questioned the spectator about the incident, but did not ask that the juror be replaced, or request any other relief at that time. According to the defendants, they did not learn of the spectator's relation to the Saylors' witness until the trial had concluded.

At the close of the evidence, the defendants moved for a directed verdict on the fraudulent misrepresentation claims, again asserting that the disclaimer language in the lease contract precluded the Saylors from recovering on those claims. This motion was denied. The defendants also requested that the jury be given a special verdict form, citing the fact that multiple claims were being asserted against multiple defendants. The district court also denied this request.

Despite his pre-trial evidentiary ruling concerning pre-judgment interest, and despite reaffirming that ruling during trial, the district judge decided at the close of the

proofs to submit this issue to the jury. The district judge therefore instructed the jury, in accordance with Tennessee law, that they possessed the discretion whether to award pre-judgment interest, and that they could award such interest on the amount of compensatory damages "at any rate of interest [they found] to be appropriate up to but not greater than 10 percent per annum." J. App. at 484-85.

On June 24, 1987, the jury returned a general liability verdict against all defendants, awarding the Saylors $875,000.00 in compensatory damages and $490,000.00 in pre-judgment interest. The latter figure represented interest at the rate of 8 percent per year *on $875,000.00* over seven years.

The defendants filed various post-trial motions, including a motion for judgment notwithstanding the verdict and a motion for a remittitur of the damages award. In addition, the defendants filed a motion seeking to interview the jurors concerning the extraneous juror contact, as well as a motion for a judicial inquiry into this matter. While all of these motions were denied initially, the district judge later decided to conduct an inquiry into the circumstances surrounding the extraneous juror contact.

On January 21, 1988, the district judge conducted an inquiry at which each of the jurors was examined individually. All of the witnesses to the incident, including the juror, the spectator, and an employee of the court who witnessed the contact, either testified or submitted an affidavit. All stated that the juror promptly terminated the conversation upon hearing that the spectator had attended the prior trial. Moreover, none of the witnesses to the incident stated that the juror was informed of the outcome of the prior trial. On questioning by the trial

judge, each of the jurors stated under oath that her vote was based solely on the evidence presented at trial and the instructions provided by the court.

After the hearing, the defendants filed a motion for a new trial pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. On February 8, 1988, the district judge denied that motion, concluding that "there was absolutely no juror misconduct, that any contact which occurred was harmless, and that all jurors exhibited exemplary behavior at all times." J. App. at 55.

## II.

In their first argument, the defendants assert that the district court erred in denying their motion for a directed verdict on the fraudulent misrepresentation claims. They maintain that the disclaimer-of-reliance language in the lease agreement forecloses recovery on these claims because reliance is an essential element of fraud. The defendants also attempt to distinguish between contractual provisions purporting to disclaim *liability* and those purporting to disclaim reliance, asserting that Tennessee law disfavors only the former. Finally, the defendants contend that our decision in *Saylor I* does not squarely address the effect of reliance disclaimers under Tennessee law, and that the law-of-the case doctrine therefore is not applicable.

The pertinent terms in the lease contract provide as follows:

* * *

> 10. The Seller hereunder is an independent contractor none of whose representations are binding on the Manufacturer.

* * *

14. Preamble – Buyer understands the conditions of the use of the products and is not relying on the skill or judgment of the Manufacturer or Seller in selecting them because Buyer acknowledges that farming and livestock feeding results are very much the product of individual effort combined with various climatic, soil, water, growing and feeding conditions which are beyond the control of the Manufacturer and Seller. Buyer recognizes that any advertisements, brochures, and other written statements which he may have read, including any farm profit plan which may have been shown to him, as well as any oral statement which may have been made to him, concerning the potential of the Harvestore and or Slurrystore units and allied machinery and equipment, are not guarantees and he has not relied upon them as such because the products will be under Buyer's exclusive management and control . . . .

* * *

ACKNOWLEDGEMENT AND RELIANCE

I HAVE READ AND UNDERSTOOD THE TERMS AND CONDITIONS OF THIS PURCHASE ORDER INCLUDING THE WARRANTIES. DISCLAIMERS AND TERMS AND CONDITIONS HEREIN GIVEN TO ME, EITHER BY THE MANUFACTURER OR THE SELLER. I RELY ON NO OTHER PROMISES OR CONDITIONS AND REGARD THAT AS REASONABLE BECAUSE THESE ARE FULLY ACCEPTABLE TO ME.

J. App. at 824a (emphasis added).

The defendants assert that in *Saylor I*, we do not squarely address the effect of such a *reliance* disclaimer under Tennessee law. However, the contractual provisions at issue in *Saylor I* are the identical provisions involved in this case, and the *Saylor I* court held that "the district court did not err in denying summary judgment and a directed verdict on the basis of the *disclaimers of reliance.*" 803 F.2d at 1407 (emphasis added). Moreover, the same issue was presented to this court in *Agristor Leasing v. William Dayon Taylor*, 865 F.2d 1267 (6th Cir. 1989), wherein the court stated as follows:

> AOSHPI argues [that] the district court erred in failing to give effect to its "disclaimer of reliance." AOSHPI attempts to distinguish its "disclaimer of reliance" from the "disclaimer of liability" in the Agristor lease in *Saylor* [I]. We find the claimed distinctions to be ineffective in light of *Saylor* [I] and Tennessee law, which gives no effect to disclaimers in the presence of fraud or negligent misrepresentations.

Slip op. at 10. Contrary to the defendants' assertions, the *Saylor I* court expressly held that the contractual disclaimer involved in this case was not effective to shield the defendants from liability for fraudulent misrepresentation. Moreover, we have since held in the *Taylor* decision that the defendants' claimed distinction between liability disclaimers and reliance disclaimers is not effective. Given the decisions in *Saylor I* and *Taylor*, we are bound to reject the defendants' arguments concerning this issue.

## III.

The defendants next contend that the district court erred in denying their motion for a new trial, which was filed

after the judicial inquiry into the circumstances and effect of the outside juror contact. The defendants assert that the juror's contact with the spectator was presumptively prejudicial to them, and that a new trial was required because the plaintiffs did not rebut that presumption of prejudice.

The defendants filed their motion for a new trial pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Rule 60(b) states, in pertinent part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: .... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) .... (6) any other reason justifying relief from the operation of the judgment.

The decision whether to grant a Rule 60(b) motion is committed to the sound discretion of the trial court, and the granting or denial of such a motion may not be reversed unless the trial court abuses its discretion. *In Re Salem Mortgage Co.*, 791 F.2d 456, 459 (6th Cir. 1986).

The defendants rely on *Remmer v. United States*, 347 U.S. 227 (1954), for the proposition that unauthorized contacts with jurors are presumptively prejudicial, and that the burden is on the party seeking to preserve the judgment to show lack of prejudice. In *Remmer*, the Supreme Court stated that:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed

> presumptively prejudicial, if not made in pursuance of known rules of the court and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

347 U.S. at 451. While *Remmer* was a criminal case, the doctrine of "presumed prejudice" also has been applied in the civil context. *See, e.g., Krause v. Rhodes*, 570 F.2d 563, 568 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Therefore, if *Remmer* were controlling law, the burden would have been on the Saylors to establish lack of prejudice from the unauthorized contact. However, in *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985), this court interpreted a more recent Supreme Court decision, *Smith v. Phillips*, 455 U.S. 209 (1982), as superseding the *Remmer* rule. Although *Phillips* did not expressly overrule *Remmer*, the *Phillips* Court stated that the "remedy for allegations of juror partiality is a hearing in which the *defendant has the opportunity to prove bias.*" 455 U.S. at 215 (emphasis added). Interpreting this language in *Pennell*, we stated:

> Thus, the Court held that *Remmer* does not govern the question of the burden of proof where potential jury partiality is alleged. Instead, *Remmer* only controls the question of how the district court should proceed where such allegations are made .... In light of *Phillips*, the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. *Prejudice is not to be presumed.*

737 F.2d at 532 (emphasis added; footnote omitted). *Accord United States v. Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988) (noting that *Pennell* provides the controlling rule in this Circuit).

The defendants in this case argue that *Phillips* and *Pennell* apply only to pre-verdict hearings for juror prejudice, and that *Remmer* continues to govern post-verdict hearings for juror prejudice. While admitting that nothing in *Pennell* so limits its holding, the defendants assert that applying *Pennell* to post-verdict hearings would violate Rule 606(b) of the Federal Rules of Evidence. Rule 606(b) provides, in pertinent part, as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, *except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.*

(emphasis added).

Given the above-emphasized language, the defendants' interpretation of *Pennell* must fail. Presumably, under the *Remmer* rule, the party seeking to preserve the judgment would be allowed to demonstrate the *absence* of prejudice by questioning the jurors, post-verdict, under the authority of the Rule 606(b) exception. However, the defendants assert that the post-verdict questioning of jurors to establish the *existence* of prejudice under the *Phillips/Pennell* rule would violate Rule 606(b). Plainly, if post-verdict

questioning of jurors was permissible when the *Remmer* presumption was applicable, such post-verdict questioning is permissible under *Phillips* and *Pennell*. The interpretation and application of Rule 606(b) does not turn upon who has the burden of proof.

Because the holding in *Pennell* applies equally well to pre-verdict and post-verdict hearings for juror prejudice, the defendants in this case bore the burden of proving that the extraneous juror contact resulted in actual prejudice. Since the defendants failed to carry that burden, the district court did not abuse its discretion in denying their motion for a new trial on this ground.

## IV.

The defendants' final argument concerns the manner in which the district court submitted the pre-judgment interest issue to the jury. As stated earlier, the district judge made a pre-trial ruling that the parties could not introduce evidence on this issue because the court, not the jury, would determine whether such damages should be awarded and in what amount. The district court reaffirmed that ruling during trial. Nevertheless, at the close of the evidence, the court decided to submit the issue to the jury. The jury subsequently awarded $490,000.00 of pre-judgment interest on compensatory damages of $875,000.00. The jury applied an interest rate of eight per year [sic] to the *total* compensatory damage award from July of 1980, when the Saylors purchased the Harvestore equipment, to June of 1987, the date of the jury's verdict. The pre-judgment interest award thus represents $70,000 per year for seven years.

The defendants contend that the pre-judgment interest award is improper because the Saylors did not suffer *all*

of their damages as soon as they leased the Harvestore equipment. They argue that the Saylors suffered gradual losses from 1980 until 1985, when they slaughtered the herd and closed down the farm. The defendants further assert that the jury's error in this regard requires a new trial, rather than a remittitur, because the absence of any record evidence on this issue precludes a mathematical computation of the proper amount of pre-judgment interest. Moreover, the defendants assert that the district court's refusal to submit special interrogatories to the jury forecloses a remittitur because the jury's verdict does not indicate what portion of the compensatory damage award is for property losses (arising from the strict liability claims) and what portion is for economic losses (arising from the fraud claims). In the defendants' view, this fact precludes this court from determining when the various losses were suffered, thereby preventing an accurate determination of the proper amount of pre-judgment interest.

Tennessee Code Annotated § 47-14-123 (1980) states:

> Pre-judgment interest, i.e., interest as an element of, or in the nature of, damages, as permitted by the statutory and common laws of the states as of April 1, 1979 may be awarded by courts or juries in accordance with the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum . . . .

(emphasis added). Under this provision, courts and juries possess wide discretion in the awarding of pre-judgment interest, and their award should not be disturbed " 'unless the record discloses a manifest and palpable abuse of discretion.' " *Schoen v. J.C. Bradford & Co.*, 667 S.W.2d 97, 101 (Tenn. App. 1984) (quoting *Engert v. Peerless Insurance Co.*, 382 S.W.2d 541, 550 (Tenn. App. 1964)). This

court has held recently that "[w]here a jury grants a particular damage award and the district court refuses to disturb that finding, an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial." *In Re Lewis*, 845 F.2d 624, 635 (6th Cir. 1988).

Despite this deferential standard of review, we conclude that the jury abused its discretion in calculating the prejudgment interest award. Under Tennessee law, "[p]rejudgment interest on a property damage award accrues from the date that the defendant's tortious conduct effectively operates to destroy or diminish either the resale value, the rental value, or even the personal use and enjoyment of the plaintiff's property." *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1213 (6th Cir. 1988) (citing cases). Likewise, pre-judgment interest on economic damages (*e.g.*, lost profits) is "calculated from some *specific* date or dates as found by the court that precede the date of the judgment, and is computed from that date or dates down to the date of the judgment at the prejudgment rate . . . ." *American Buildings Co. v. DBH Attachments, Inc.*, 676 S.W.2d 558, 566 (Tenn. App. 1984) (emphasis added). In the instant case, the jury awarded pre-judgment interest on the Saylors' total compensatory damage award of $875,000.00 from the time that they leased the Harvestore equipment in July 1980, to the date of the jury verdict in June 1987. This award constitutes a "manifest and palpable abuse of discretion" since it is clear from the record that the Saylors did not incur all of their damages in 1980, but instead suffered gradual losses from 1980 until 1985. Therefore, the jury clearly erred in its calculation of prejudgment interest.

The defendants argue that the jury's error requires a new trial because, as they assert, there is no principled

manner in which to calculate a remittitur on the present state of the record. We disagree. Although the general verdict in this case does not allow for a precise calculation on our part of the proper amount of pre-judgment interest, the record permits us to fashion a minimum award. Since it is clear from the record that the Saylors incurred *all* of their damages (both property losses and economic losses) by July 1985, we believe that the Saylors are entitled to at least two of the seven years of pre-judgment interest which the jury awarded. Therefore, applying the jury's chosen interest rate of eight percent per year to the compensatory damage award of $875,000.00, we conclude that a pre-judgment interest award of $140,000.00 is permissible on the record presented. Accordingly, we believe that a remittitur of $350,000.00 of the jury's pre-judgment interest award is required.

V.

For the reasons set forth above, the order of the district court denying the defendants' motion for a new trial is REVERSED to the extent that it failed to direct a remittitur of a portion of the pre-judgment interest award. Accordingly, we REMAND this case to the district court with instructions to grant a new trial *limited to the damages issue*, unless the plaintiffs file in the district court, within thirty days of the filing of this opinion, a motion requesting a remittitur of $350,000.00 of the pre-judgment interest award.

[Filed July 10, 1989]

No. 87-5990/6002
88-5279/5314

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

AGRISTOR LEASING, A WISCONSIN PARTNERSHIP,

Plaintiff,

JAMES SAYLOR AND KAAREN SAYLOR d/b/a UDDER NONSENSE DAIRY,

Defendants, Counter Plaintiffs, Third Party Plaintiffs-Appellees,

v.

A.O. SMITH HARVESTORE PRODUCTS,

Third Party Defendants-Appellants.

---

ORDER

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BEFORE: KEITH, JONES and GUY, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk

[Filed February 8, 1988]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

No. CIV-4-83-94

JAMES SAYLOR and wife, KAAREN SAYLOR, individually and d/b/a "UDDER NONSENSE DAIRY"

v.

A. O. SMITH HARVESTORE PRODUCTS, INC., HERMITAGE HARVESTORE SYSTEMS, INC., and CHUCK DOWDY

ORDER

The defendants in this case contended that an outside communication was made to a juror and that a juror was previously acquainted with a witness in this case. In order to investigate these allegations, this Court held a full judiciary inquiry on January 21, 1988. After conducting the inquiry, this Court finds that there was absolutely no juror misconduct, that any contact which occurred was harmless, and that all jurors exhibited exemplary behavior at all times. Accordingly, the defendant's motion for a new trial is hereby DENIED.

ENTER:

/s/ THOMAS G. HULL
Thomas G. Hull
United States District Court

## Summary Chart Of Judicial Inquiry Testimony

| Juror | Knowledge of Contact During Trial | Substance of Communication | Other Jurors Told | Contact Reported[1] | Knowledge of Contact After Trial |
|---|---|---|---|---|---|
| Bell[2] | Yes (JA 519) | First Trial (JA 520) | No (JA 522) | To Marshal (JA 519, 521) | – |
| Lawwell | Yes (JA 512) | Mr. Saylor (JA 514) | Yes (JA 512) | – | – |
| Posey | Yes (JA 525) | Cannot Recall (JA 527) | Yes (JA 527) | Not Certain (JA 525) | – |
| Davidson | No (JA 531-32) | – | – | – | Yes, Mrs. Bell told all jurors on day of judicial inquiry (JA 534) |
| Bradford | No (JA 535) | – | – | – | No (JA 535) |
| Scarbrough | No (JA 536-37) | – | – | – | No (JA 537) |
| Decker | Yes (JA 538) | Cannot Recall (JA 539) | Yes (JA 539) | To Clerk (JA 539) | – |

[1] One of Respondents' counsel stated that his partner initially reported the incident to the court. (JA 507).

[2] Bell was the juror who had the extraneous communication with the interested spectator.

Supreme Court, U.S.
FILED
SEP 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-328

In The

# Supreme Court of the United States

October Term, 1989

A. O. SMITH HARVESTORE PRODUCTS, INC., HERMITAGE HARVESTORE SYSTEMS, INC., and CHUCK DOWDY,

*Petitioners,*

v.

JAMES D. SAYLOR and KAAREN SAYLOR, d/b/a UDDER NONSENSE DAIRY,

*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## RULE 28.1 LISTING

Rule 28.1 is not applicable to Respondents, James D. and Kaaren Saylor, d/b/a/ Udder Nonsense Dairy

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## INTRODUCTION

The Petitioners have petitioned this court for a writ of certiorari to set aside the United States Sixth Circuit Court of Appeals' decision filed on April 29, 1989 which affirmed the jury's general verdict finding the defendants liable for fraud and intentional misrepresentation and awarding $875,000.00 in compensatory damages and $490,000.00 in prejudgment interest (JA 40), $350,000.00 of which the Sixth Circuit granted a remittitur due an error in calculation. The Appellants assert that 1) regarding an extraneous juror contact which occurred during the course of the trial, the Petitioners were entitled to the rebuttable presumption of prejudice as set forth in *Remmer v. United States*, 347 U.S. 227 (1954), as opposed to the rule adopted in the Sixth Circuit opinion of *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984) *cert. denied* 469 U.S. 1158 (1985) interpreting *Smith v. Phillips*, 455 U.S. 209 (1982) as requiring the appellant to prove or establish actual prejudice of the contact and 2) that Rule 606(b) of the Federal Rules of Evidence precluded solicitation of evidence or inquiry in a post-verdict hearing of the jurors regarding the effect that the extraneous contact had on their verdict. The petition should not be granted because a determination of the legal issues of 1) which of these rules is proper or 2) whether Rule 606(b) precludes such jury testimony or inquiry is not determinative of this particular case. It is the facts of this case, and not the legal issues raised, which are dispositive of this matter. There was sufficient unquestionable admissible evidence produced at the post-trial *Remmer* type hearing, even if the one question asserted to be proscribed by Rule 606(b)

is totally disregarded, to demonstrate that this juror contact was absolutely harmless, devoid of prejudice and sufficient to overcome or rebut any presumption of prejudice, if one exists. Based upon the evidence produced at the hearing, the district court made a factual determination that "there was absolutely no juror misconduct and any contact which did occur was harmless." Because the contact was "harmless", it is not grounds for granting a new trial.

> . . . The court at every stage of the proceeding *must* disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Federal Rules of Civil Procedure 61; *McDonough Power & Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553; 104 S.Ct. 845, 849 (1984).

## FACTS

The first trial of this case, which commenced on January 21, 1985, and resulted in a verdict by the jury against the Petitioners for fraud and an award of $1,000,000.00 in compensatory and punitive damages, was reversed by the Sixth Circuit Court of Appeals and remanded for a second trial only on the grounds that the issue of violation of statute of limitations should have been submitted to the jury.

The second trial of this case commenced on June 8, 1987. During the second week of the trial, a spectator, Ms. Shaw Taylor, commented during a recess to one of the jurors, Ms. Nadel Bell, that "we sat through this whole

case two years ago." (App. 7; JA 520-521) That was the entire content of Ms. Taylor's statement. Ms. Taylor made no statement regarding the result of the first trial. (App. 6-7, 11, 16; JA 520-521, 544-545, 560-561). Upon report of this incident being made to all parties immediately after its occurring, it is undisputed that Mr. Herod, counsel for Petitioner, A. O. Smith Harvestore Products, Inc, (AOSHPI), questioned Ms. Taylor regarding the incident. (JA 87, 94, 546-547). Regarding the conversations with Mr. Herod, Ms. Taylor states:

> I, Ms. Eva Mel Taylor, of 603 North Porter Street, Winchester, Franklin County, Tennessee, being first duly sworn, state: (1) After I had spoken to Ms. Nadine Bell in the ladies restroom during the trial of the case involving Jim and Kaaren Saylor and A. O. Smith Harvestore Products, Inc., I went back into the courtroom. Almost as soon as I arrived in the courtroom, an attorney for A. O. Smith Harvestore Products, Inc., who I now know to be Mr. Rick Herod, came over and asked me some questions; (2) Mr. Herod asked me if I had talked to the juror in the restroom and I told him I did; (3) Mr. Herod asked me what I had said to the juror in the restroom; (4) I told Mr. Herod what I had stated to the juror as I have already testified to in the hearing held on January 21, 1988; (5) I answered any and all questions Mr. Herod asked me and answered them as truthfully as I knew how, after which Mr. Herod walked away; (6) Mr. Herod later came back to me and told me not to worry about what had happened. Mr. Herod said the Judge had said, "It was just one of those things" and I was not to worry about it; (7) At no time did Mr. Herod ask me my identity; (8) The comment made to the juror was casually and inadvertently made to an individual who I recognized as a long ago acquaintance, with no intent to

impart any information to the juror regarding the case. (JA 94).

After being immediately informed of the contact, counsel for all parties were summoned to the Court's chambers. Mr. Herod had questioned Ms. Taylor prior to the chambers conference. Upon inquiry by the court of what action the parties wanted it to take, the Appellants *chose* to go forward with the trial. The Petitioners did not ask the Court for any relief whatsoever, did not ask for a mistrial, did not ask that inquiry be made of the juror involved, did not ask that the juror be stricken, although an alternate was available until the close of the trial (JA 536-537), did not ask the court to inquire of Ms. Taylor regarding the incident, did not ask for further opportunity to question Ms. Taylor themselves, did not have any of the matters regarding the contact or the chambers conference made a matter of record, nor raise the issue after the verdict was returned prior to dismissal of the jury. (JA 87, 90, 490).

At the conclusion of the trial on June 24, 1987, the jury, returned the general verdict in favor of the Saylors. (JA 40). After the trial and the verdict, the Petitioners made a post-trial motion for judicial inquiry regarding the juror contact. On January 21, 1988, the district court conducted a hearing regarding the matter in the presence and with participation of counsel for all parties at which each of the six jurors, the two alternates, the spectator who had made the contact with the juror and, Ms. Blake, the court clerk who was a witness to the contact, were individually examined regarding the facts and circumstances surrounding the contact. (JA 492-575).

During the hearing Ms. Bell, the juror involved in the contact, testified as follows regarding the circumstances and the entire content of the contact.

> THE COURT: Just start at the beginning and tell it through, please.
>
> MRS. BELL: Okay. She just pushed the door open and saw me. I was there washing my hands and she said, oh, hello, Naydell, I haven't seen you in so long and good to see you, and I said – I looked at her and I said I'm sorry I don't recognize you, you know, and I didn't. I said what's your name and it was – I was kind of talking low and she was kind of talking loud and it was like she didn't hear what I was saying. And she just went ahead and made one more statement, and she said, "We sat through this whole case two years ago", I think is exactly what she said. I said, "Oh, I'm sorry, I can't talk about the case." And so we stopped it right there and –
>
> THE COURT: And that's – she said nothing else that you remember? That's the substance of the conversation?
>
> MRS. BELL: Yes. That was the entire remark that was said.
>
> THE COURT: Then you left as you say and came and told the marshal about it?
>
> MRS. BELL: Yes. That's correct. Uh-huh.

(App. 6, 7; JA 520-521).

Ms. Taylor (App. 11-19; JA 555-564) and Ms. Blake, the witness court clerk, (App. 9-10; JA 543-545) testified consistent with Ms. Bell's account of the incident. (App. 3-8, 20-23; JA 516-522, 568-572). The testimony of each of the three indicates no disclosure of which party, if either,

had been successful at the first trial. (App. 6-7, 11, 16; JA 520-521, 544-545, 560-561).

Near the end of the hearing, the Court inquired of the jurors collectively "did you decide it [verdict] on the evidence and nothing else," to which all jurors replied affirmatively. (JA 563)

Following the judicial inquiry, Motions for New Trial Due to Outside Contact With a Juror and submission of briefs, the District Court summarily denied the motion for a new trial upon making a factual determination that "there was absolutely no juror misconduct and any contact which did occur was harmless." (JA 55).

## REASONS FOR DENYING THE WRIT

### I. Third Party Defendants Waived Their Right to Complain

The Petitioners clearly waived any right to complain about this contact by expressly declining to seek any relief at the time it occurred during the course of the trial.[1] The Petitioners obviously 1) recognized that the incident was not prejudicial; or 2) wanted to give the jurors an opportunity to return a verdict favorable to the

[1] Contrary to the assertion of the Petition, neither the district court nor the circuit court rejected Saylors' argument that the Petitioners waived their right. Neither addressed such argument in any respect, simply found that the Petitioners' motions for new trial were without merit because the contact was "harmless".

Petitioners. A party waives any objection if it knows of an outside influence, even a prejudicial one, before the jury finishes deliberating, "but had nevertheless stood mute, gambling on an acquittal while holding the issue in reserve." *United States v. Gersh*, 328 F.2d 460, 463 (2nd Cir. 1964).

> By their own sworn affidavits Plaintiffs have admitted to having observed what they believe to be misconduct by the opposing party and his counsel, yet they failed to alert the Court or object at trial. It is a well-settled rule that under such circumstances the party has waived his right to object. (citation omitted) The rationale for this rule was aptly stated in one of the first cases to address this question. *Berry v. DeWitt*, 27 F. 723, 724 (Cir.Ct.S.D.N.Y. 1886).
>
> > [M]isconduct of a juror during the trial, if known to the party at the time of its occurrence, and not made the subject of a motion to the Court, is waived. A party cannot know, during the trial, a fatal objection arising from the misconduct of a juror upon the trial, and keep silence, and take advantage of it in the event of an adverse verdict. He is not permitted to "speculate upon the chances of a verdict."
>
> This reasoning was echoed by the Fourth Circuit (then the Circuit Court of Appeals, Fourth Circuit) in *Upton v. Harrison*, 68 F.2d 232, 233 (4th Cir. 1932). "[H]aving been silent when it was his duty to speak, he will 'not be heard to speak when it is his duty to be silent.' *Qui taset consentire viditur.*"

*Nolan v. Nolan*, 97 F.R.D. 537, 541 (S.D. W.Va. 1983). *See, e.g., United States v. Dean*, 667 F.2d 729, 734 (8th Cir. 1982)

(waived by failure to bring to court's attention during trial even though prejudicial); *United States v. Shackleford*, 777 F.2d 1141 (6th Cir. 1985) (waived by failure to complain when juror contact occurred during the course of trial or prior to dismissal of the jury); *United States v. Bufalino*, 576 F.2d 446, 451 (2nd Cir. 1978) (waived right to complain about insufficient inquiry of jurors by failing to request further inquiry during course of the trial).

Although *United States v. Moten*, 582 F.2d 654 (2nd Cir. 1978) held that no waiver occurred because counsel who failed to raise the issue earlier were denied access to certain relevant facts, the court recognized that a finding of waiver was appropriate where, as in this case, no facts were withheld. The Petitioners talked to Ms. Taylor, she answered all questions asked and they made no effort or requests of the Court to inquire further of Ms. Taylor, Ms. Bell or any other juror at the time the contact occurred. (JA 94). The Court in *Moten, supra.*, 582 F.2d at p. 660, quoted as follows:

> Therefore, Moten, would be entitled to a new trial *only* if he can make a showing of "significant new objective facts" which strongly tend to prove that the Keno affair tainted one or more of the other jurors. (emphasis added).

The Petitioners assert that they were not aware at the time that the contact occurred that Ms. Taylor was the relative of a prospective witness. The Petitioners were not denied this information, they simply did not make inquiry sufficient to make such a determination. In any event, the identity of the spectator or the fact that the spectator was a relative of a prospective witness is of absolutely no consequence because Ms. Bell never knew

or realized that Ms. Taylor was a relative of Mr. Ed Taylor, who later testified as a lay witness in the rebuttal portion of the trial. (App. 21; JA 571). The fact that Ms. Taylor was an aunt by marriage (App. 12; JA 556) of a prospective witness is not a "significant new objective fact which strongly tends to prove" that the contact "tainted one or more of the other jurors" such that the waiver should be disregarded.

## II. There was Sufficient Unquestionably Admissible Evidence Presented at the Judicial Inquiry To Establish that the Contact was Harmless and Not Prejudicial and/or to Rebut Any Presumption of Prejudice

Whether the rule of rebuttable presumption of prejudice or the rule that the one seeking a new trial must prove actual prejudice is applied to this case is of no consequence because there was sufficient unquestionable admissible evidence produced at the judicial inquiry, even if the evidence asserted to be in violation of Rule 606(b) of the Federal Rules of Evidence is totally disregarded, to show that the contact was harmless, devoid of prejudice and/or to rebut any presumption of prejudice if one exists. Relying upon *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), and cases which follow it, the Petitioners assert that once established that an extraneous contact occurred, the contact was presumed prejudicial, entitling the Petitioners to a new trial unless the Saylors rebutted the presumption by demonstrating that the contact was harmless. The Petitioners essentially argue that, due to the proscriptions of Rule

606(b) of the Federal Rules of Evidence, after a verdict has been returned by the jury, the presumption is conclusive. Such is clearly not the law.

The *Remmer* rule is not conclusive, but is rebuttable in post, as well as pre-verdict settings. *Remmer, supra.*, 347 U.S. at p. 229. The presumption can be overcome by affirmatively showing that there was no prejudice in fact or that the contact was harmless. *Id.* at p. 229; *United States v. Hornung*, 848 F.2d 1040, 1044-45 (10th Cir. 1988). *Remmer*, which involved a post-verdict hearing, commands at p. 229:

> The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial in a hearing with all interested parties permitted to participate.

Only one question asked at the hearing is asserted to be proscribed by Rule 606(b) of the Federal Rules of Evidence. The Petitioners insist that absent that one question and response, there is no evidence in the record to rebut the presumption that the contact did influence the jury's verdict. A reading of testimony elicited at the *Remmer* type hearing held in this case is all that is necessary to demonstrate the lack of merit in that insistance. There was a complete inquiry by the court in the presence of and with the participation of counsel for all parties of all involved or potentially involved jurors, participants and witnesses to the contact regarding the content of and circumstances surrounding the contact. Such evidence as was produced at this *Remmer* type hearing is not only

admissible but required by *Remmer* to "determine the circumstances, the impact there of upon the juror and whether or not it was prejudicial."

Clearly, a post-verdict hearing could have been avoided by the Petitioners raising the issue prior to the verdict at the time the contact occurred during the course of the trial, rather than waiting until after the conclusion of the trial. Rule 606(b) of the Federal Rules of Evidence, which specifically addresses post-verdict inquiries and reads in part as quoted below, does not prohibit receipt of testimony from or consideration by the court of the facts and circumstances surrounding an extraneous contact or influence in a post-verdict hearing. *United States v. Hornung, supra.*, 848 F.2d at 1045; *United States v. Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981) *cert. denied*, 456 U.S. 962 (1982); *In Re: Beverly Hills Fire Litigation*, 695 F.2d 207, 213 (6th Cir. 1982):

> (b) **Inquiry into validity of verdict or indictment** . . . except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Federal Rules of Evidence 606(b). Many of the cases cited by the Petitioners in which the rule of presumptive prejudice was applied are post-verdict hearings in which the circumstances surrounding the extraneous influence are inquired into.[2]

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[2] *See, e.g., DeGrave v. United States*, 820 F.2d 870, 872 (7th Cir. 1987) (remanded for post-verdict hearing regarding expert communication with jurors); *United States v. Corporale*, 806 F.2d

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*United States v. Greer*, 620 F.2d 1383 (10th Cir. 1980) is cited by the Petitioners for the proposition that "the effect of the Rule [606(b)] is that a presumption of prejudice cannot be overcome once a jury has reached its verdict." As reflected in Judge Barrett's dissenting opinion, such an interpretation rendering the presumption conclusive is contrary to *Remmer* and to Rule 606(b). *Id.* at p. 1387. The 10th Circuit's subsequent opinion of *United States v. Hornung*, 848 F.2d 1040, 1044 (10th Cir. 1988) specifically considered *Greer* and held that *Greer* does not stand for the "proposition that the presumption of prejudice is irrebuttable once the jury has reached its verdict." *Id.* at p. 1044. Likewise, *Owen v. Duckworth*, 727 F.2d 643 (7th Cir. 1984), although stating that a determination of jury prejudice is complicated by the prohibition of Rule 606(b) on questioning the jurors regarding the affect of the outside contact on their deliberation, held that post-verdict inquiry into the basic facts must be made, from which the court must then make the ultimate factual determination, as follows:

> Rather than question the jurors directly, a district court must make findings of fact at two

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1487, 1502 *cert. denied*, 482 U.S. 917 (1987) (11th Cir. 1982) (post-verdict hearing on jury tampering allegations); *United States v. Bagnariol*, 665 F.2d 877, 884 (9th Cir. 1981) *cert. denied*, 456 U.S. 962 (1982) (post-verdict hearing regarding jurors library visit); *United States v. Hornung*, 848 F.2d 1040, 1045 (10th Cir. 1988) (post-verdict inquiry regarding third party contact with juror); *United States v. Bassler*, 651 F.2d 600, 603 (8th Cir. 1980) (post-verdict hearing regarding juror notes); *United States v. Delaney*, 732 F.2d 639, 643 n.6 (8th Cir. 1984) (post-verdict affidavit can be used to show circumstances).

> separate levels. First, the district court must find the basic, or subsidiary, facts – e.g., the nature, content, and extent of the extra-judicial contact. Based on its findings of subsidiary facts, the district court must then make the ultimate factual determination: whether the contact likely affected the juror's impartiality. *United States v. Vasquez*, 597 F.2d 192, 194 (9th Cir. 1979); *United States v. Howard*, 506 F.2d 865, 868-69 (5th Cir. 1975).

*Id.* at p. 646.

Rather than employing the rebuttable presumption of *Remmer*, the Sixth Circuit has held that that the burden of showing prejudice rests on the party seeking to set aside the verdict. *United States v. Zelinka*, 862 F.2d 92, 95-96 (6th Cir. 1988); *United States v. Marshall*, 767 F.2d 293, 295 (6th Cir. 1985); *United States v. Griffith*, 756 F.2d 1244, 1252 (6th Cir. 1985); *United States v. Pennell*, 737 F.2d 521, 532 (6th Cir. 1984) *cert. denied*, 469 U.S. 1158 (1985).

In *Pennell, supra.*, in which five jurors received anonymous telephone calls after jury deliberations began, this court held that the rule stated in *Remmer*, and prior Sixth Circuit opinions which relied upon it, was changed by the filing of *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). *Pennell, supra.*, 737 F.2d at p. 532. *Smith v. Phillips, supra.*, 455 U.S. at 217, 102 S.Ct. at 946, which, like *Remmer*, involves a post-verdict hearing fact situation, holds that the proper procedure is for the judge to hold a hearing "to determine the effect of such occurrences when they happen."

Even cases and circuits which follow the rule of presumptive prejudice, including those which expressly

criticize the Sixth Circuit's interpretation of *Remmer* and *Smith v. Phillips*, in *Pennell*, require that in order to invoke the rule of presumptive prejudice that it be shown not only that an extrajudicial contact did occur, but that it was of such a nature as to reasonably cast doubt on the validity of the jury's verdict. *Stockton v. Commonwealth of Virginia*, 852 F.2d 740, 743 (4th Cir. 1988); *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1537 n.9 (4th Cir. 1986). These courts have recognized that certain extrajudicial contacts may amount to nothing more than innocuous interventions that simply could not justify a presumption of prejudicial affect. *Haley v. Blue Ridge Transfer Co., Inc.*, 802 F.2d 1532, 1537 n.9 (4th Cir. 1986); *Dennis v. General Electric Corp.*, 762 F.2d 365, 367 (4th Cir. 1985). If the presumption is invoked, the opposing party "may rebut the presumption through whatever circumstantial evidence is available, including juror testimony on the facts and circumstances surrounding the extraneous communication." *Stockton v. Commonwealth, supra.*, 852 F.2d at p. 744.

*United States v. Butler*, 822 F.2d 1191 (D.C. Cir. 1987) involved a post-verdict judicial inquiry of jurors who were questioned regarding a contact with one juror by the defendant. Although *Butler* states that it is applying the rule of presumptive prejudice, and although it expressly disagrees with the *Pennell* interpretation of *Remmer* and *Smith v. Phillips*, it nonetheless held that the proper procedure was for the judge "to determine whether the exposure of the juror was prejudicial or harmless and appellate courts must defer to this finding on review." *Butler, supra.* at p. 1196. The court held that

the facts of the case fully justified the trial court's ruling that the contact was harmless. *Id.* at p. 1197.

> [T]he inquiries put to the juror need only be sufficiently detailed to permit the judge to determine whether any prejudice is likely to result . . .
>
> the burden of establishing harmlessness, which is placed on the government, is made less demanding by the trial judge's participation and use of all the tools necessary to evaluate the relevant facts. *Id.* at p. 1196.

Each case cited by the Appellants in each jurisdiction which applies the rule of presumptive prejudice recognized that the presumption may be rebutted and the contact may be harmless.[3] Many of those cases held specifically that the contact which was the subject of the case was not prejudicial.[4]

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[3] *See, e.g., Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535-37 (4th Cir. 1986); *United States v. Littlefield*, 752 F.2d 1429, 1431-32 (9th Cir. 1985); *United States v. Butler*, 822 F.2d 1191, 1195 (D.C. Cir. 1987); *United States v. Wiley*, 846 F.2d 150, 157 (2nd Cir. 1988); *DeGrave v. United States*, 820 F.2d 870, 872 (7th Cir. 1987); *United States v. Robinson*, 756 F.2d 56, 59 (8th Cir. 1985); *United States v. Hornung*, 848 F.2d 1040, 1043-46) (10th Cir. 1988); *United States v. Corporale*, 806 F.2d 1487, 1503 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 (1987); *Owen v. Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984).

[4] *See, e.g., United States v. Wiley*, 846 F.2d 150, 157-158 (2nd Cir. 1988) (exhibit list in jury room harmless); *United States v. Hornung*, 848 F.2d 1040, 1045-48 (10th Cir. 1988) (unsolicited conversation juror had with bank employee regarding defendant harmless); *United States v. Leon*, 739 F.2d 885, 893, n.20

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The facts of this case are not consistent with the type of cases in which prejudice is found to be unrebuttable. In discussing the kind of cases which are generally found harmless, the courts have stated as follows:

> The affected juror was brought into the hearing and extensively questioned. The judge's questioning fully revealed the details of the alleged exchange between the defendant and the juror. The nature of the contact was relatively innocuous; it did not provide the juror with any crucial extra-judicial information, and it did not constitute an attempt to bribe or intimidate the juror, which is the kind of contact that clearly could, in and of itself, prejudice the juror. *Cf. United States v. Delaney*, 732 F.2d 639, 641 (8th Cir. 1984) (extra-judicial information); *Owen v. Duckworth*, 727 F.2d 643, 644 (7th Cir. 1984).

*United States v. Butler*, 822 F.2d 1191, 1196 (D.C. Cir. 1987).

> No bright line divides cases of juror misconduct that demand reversal from those that must be affirmed. But some similarities are discernible from cases in which convictions were reversed. Juror misconduct generally relates directly to a material aspect of the case. When finding reversible prejudice, courts have described a

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(3rd Cir. 1984) (off-handed comment by policeman to juror not prejudicial – record rebutted presumption); *United States v. Robinson*, 756 F.2d 56, 59 (8th Cir. 1985) (juror contact between juror and witness casual, unintentional and did not result in prejudice); *United States v. Corporale*, 806 F.2d 1487, 1503 (11th Cir. 1986) *cert. denied* 482 U.S. 917 (1987) (outside juror contact with friends and relatives discussing trial had no effect); *United States v. Butler*, 822 F.2d 1191 (D.C. 1987) (juror contact with the defendant which the juror had relayed to the other jurors harmless).

> direct and rational connection between the extrinsic material and a prejudicial jury conclusion, as distinguished from a connection that arises only by irrational reasoning.

*United States v. Bagnoriol, supra.*, 665 F.2d at p. 885.

*Budoff v. Holiday Inns, Inc.*, 732 F.2d 1523 (6th Cir. 1984), in which the Sixth Circuit court applied the *Remmer* rule of presumptive prejudice prior to its opinion in *Pennell* and ordered a new trial, recognized that a harmless contact does not necessitate a new trial and is instructive on the type of facts situations which are not deemed to be prejudicial by stating:

> Foremost is the fact that the contact in this case was deliberate and purposeful: the employee initiated the telephone conversation purposely to discuss the case with the juror's son. If the contact had occurred by "mere accident or inadvertence, without any improper design," then there could be no "just or reasonable grounds to disturb the verdict" unless it appeared that the contact had an improper influence upon the juror.

The Petitioner asserts that the jurors assurances that the contact did not affect their verdict should not be considered by the court. This court has previously noted in the post-verdict setting of *Smith v. Phillips, supra.*, 455 U.S. at p. 217 n. 7, that "surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind on a certain matter."

"The trial judge is generally in the best position to evaluate the critical question of whether the juror's extra

exposure to extra record evidence prejudiced the defendant." *United States v. Wiley*, 846 F.2d 150, 157 (2nd Cir. 1988). The Court "should access the 'possibility of prejudice' by reviewing the entire record, analyzing the substance of the extrinsic evidence, and comparing it to that information of which the jurors were properly aware". *United States v. Hornung, supra.*, 848 F.2d at p. 1045. The strength of the case against the losing party has a bearing on whether the contact was prejudicial or not. *United States v. Bassler*, 651 F.2d 600, 603 (8th Cir. 1980); *United States v. Hornung*, 848 F.2d 1040, 1045-1046 (10th Cir. 1988).

The trial court has broad discretion in reviewing the affect of extrajudicial information. *United States v. Hornung*, 848 F.2d at p. 1044; *United States v. Robinson*, 756 F.2d 56, 59 (8th Cir. 1985). A district court's decision not to grant a new trial after investigating the allegations of unauthorized contact with jurors should be reviewed only for abuse of discretion. *Pennell v. United States, supra.*, 737 F.2d at p. 533; *United States v. Griffith*, 756 F.2d 1244, 1252 (6th Cir. 1985).

> The trial judge is uniquely qualified to appraise the probably effect of information on the jury, the materiality of the extraneous material, and its prejudicial nature. He or she observes the jurors throughout the trial, is aware of the defenses asserted, and has heard the evidence. The judge's conclusion about the effect of the alleged juror misconduct deserves substantial weight. *See Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir. 1980), *cert. denied*, 450 U.S. 1035, 101 S.Ct. 1749, 68 L.Ed.2d 231 (1981).

*United States v. Bagnariol*, 665 F.2d at p. 885. *Accord, United States v. Butler*, 822 F.2d 1191 (D.C. Cir. 1987) ("The judge determines whether the exposure was prejudicial or harmless and appellate courts must defer to this finding on review"). This trial court was aware of the fact that this was the second separate jury that found these Petitioners liable for fraud. There was sufficient evidence to demonstrate that the trial court did not abuse its discretion in arriving at its factual determination that the contact was "harmless", even if the question asserted to be violative of Rule 606(b) is completely disregarded.

## CONCLUSION

It is apparent from the cases cited herein that the decision in this case does not rest upon which of the two rules is applied. Under either rule, the decision is one to be made by the court, based upon the facts of the particular incident, to determine whether the contact was prejudicial or harmless. Even where the rule of presumptive prejudice is employed, to raise the presumption the contact must be such as to reasonably cast doubt on the verdict. Once raised, if evidence is sufficient to show that the contact was not prejudicial or was harmless, the presumption is rebutted and disappears. The district court made a determination based upon the facts in this case and found that "any contact which occurred was harmless." (JA 55). The comments made in this case were casual happenstance remarks made without any intent to influence the juror or the outcome of the trial. (JA 94). There was no disclosure of which, if either, party was

successful at the first trial. This was the second jury that found the Petitioners liable for fraud. The trial court, being in the best position to evaluate all the circumstances, did not abuse its discretion. As stated and summarized in *Smith v. Phillips*, 455 U.S. 209, 217, 71 L.Ed. 78, 102 S.Ct. 940 (1982):

> These cases demonstrate that *due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable.* The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; *it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.* Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case. (emphasis added)

It is clear that upon the facts of this case that there was no prejudice, that the contact was harmless and that the decision of the Sixth Circuit was correct, regardless of the rule it employed. The opinion of the Sixth Circuit is an unpublished opinion. On motion for rehearing, not one justice of the circuit court voted for the rehearing or reconsideration of the panel's decision upholding the jury verdict. If the rule of law employed by the Sixth Circuit is to be corrected by this Court, this case, in which the facts

dictate the result regardless of the rule, is not the vehicle by which to correct it. This writ should be denied.

Respectfully submitted,

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# APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

---

AGRISTOR LEASING, a Wisconsin Partnership,

Plaintiff/Counter Defendant,

vs.

JAMES SAYLOR and wife, KAAREN SAYLOR, Individually and d/b/a "UDDER NONSENSE DAIRY",

Defendant/Counter Plaintiff/Third Party Defendant.

vs.

A.O. SMITH CORPORATION. A. O. SMITH HARVESTORE PRODUCTS, INC., HERMITAGE HARVESTORE SYSTEMS, INC., and CHUCK DOWDY,

Third Party Defendant.

CIVIL ACTION FILE
NO. CIV-4-83-94

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APPEARANCES: January 21, 1988

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Appearing for Chuck Dowdy.

BE IT REMEMBERED, that the above-styled cause came on to be heard on the 21st day of January 1988, before the Honorable Thomas G. Hull, Judge of said Court, when all parties announced ready to proceed, and the following evidence was introduced, to-wit:

THE COURT: All right. Good afternoon, ladies and gentlemen. Call the case, I guess. Do you have the number?

MS. CLERK: No. CIV-4-83-94, Jim Saylor, et al, vs. Hermitage Harvestore Systems, et al.

THE COURT: All right. Let's see – yes, sir.

* * *

(p. 26) (Witness: Naydell Bell)

THE COURT: Okay. Tell you what, please – I aim to ask this. Let me see y'all just one more time.

(Thereupon, an off-the-record discussion was held.)

THE COURT: Tell you what, Mrs. Lawwell, take her, Ms. Dixie, into the secretary's room. We're going to kind of separate you here a little if you don't mind. All right.

MS. CLERK: You want to call the next one that's listed?

THE COURT: Yeah. Who is that?

MS. CLERK: Naydell S. Bell.

THE COURT: Naydell S. Bell. Make yourself comfortable. We won't keep you any longer than we have to I guarantee you. Would you raise your right hand, please, ma'am?

(Whereupon, the witness was duly sworn.)

THE COURT: Just have a seat, please Mrs. Bell, you were on my jury here that tried this case of James Saylor and wife versus Harvestore Companies; is that correct?

MRS. BELL: Yes, sir.

THE COURT: Okay. And you were (p. 27) subpoenaed to come in here today you don't know why; is that correct?

MRS. BELL: Yes.

THE COURT: Or do you know why?

MRS. BELL: Not exactly. I got a letter, brief letter.

THE COURT: Okay. From the clerk's office –

MRS. BELL: Yes.

THE COURT: – to tell you to come?

Okay. We got snowed out the first time.

MRS. BELL: Yes.

THE COURT: Let me ask you this. Were you in the public bathroom during the course of the time that we were trying this case when other people were there when somebody talked with you about something?

MRS. BELL: Yes.

THE COURT: Okay. Let me ask you, about what – do you remember what day that was?

Was that during a noon hour?

MRS. BELL: No. It was at a recess and, you know, I think it was in the morning part of the day.

THE COURT: Okay.

(p. 28) MRS. BELL: But I just – because when we had the short recesses, ten minute recesses it was hard for all the woman to go to the restroom at the same time, so that particular –

THE COURT: I'm sorry about that. I don't give you enough time.

MRS. BELL: Well, it's just that I happened to ask the marshal do you mind if some of us go down the hall to the restroom during recesses and he said no problem, I'll watch you, you know, go down the hall.

THE COURT: Were you the only juror there at that time or was some others with you?

MRS. BELL: I was the only juror that went to the restroom there and Miss Hopkins happened to be in the restroom at the same time.

THE COURT: Okay.

MRS. BELL: She was in there the entire time I was in there.

THE COURT: Mrs. Blake here?

MRS. BELL: Blake, I'm sorry. Mrs. Blake.

THE COURT: Okay. That's all right. The clerk here; is that right?

MRS. BELL: The clerk. Yeah.

(p. 29) THE COURT: All right. And she was there and who else was there?

MRS. BELL: Okay. Just another lady came through the door as I was about ready to leave and she called me by my name and I didn't recognize her, and then she proceeded to make a statement and I immediately said I can't talk about the case. And I came back and immediately told the marshal and he reported it. So I'm assuming the conversation was loud enough and short enough, I'm assuming Mrs. Blake heard every word that was said and it was an unfortunate incident, you know.

THE COURT: In other words, you did what I told you to do?

MRS. BELL: That's right.

THE COURT: You told them you were a juror and you couldn't talk about it and then you came and reported it to the marshal?

MRS. BELL: That's all I knew to do and I was very sorry it happened.

THE COURT: All right. Let me ask you, have you later found out who that woman is or do you know her yet or do you know where she lives?

MRS. BELL: Yes. I later figured out who it was. It had been about 20 to 30 years since (p. 30) I had seen her so she changed quite a bit. But it was Mrs. Shaw Taylor.

THE COURT: Okay.

MRS. BELL: And I went to church with them when I was young and I hadn't – you know, it's like an acquaintance of any other church member. I didn't have to close personal friendship, but I knew they were nice people and that's all I –

THE COURT: Okay. Now, do you recall what she said and if you can, please give us the conversation what she said and then you've already told us how you responded, but –

MRS. BELL: Yeah.

THE COURT: – just start at the beginning and tell it through, please.

MRS. BELL: Okay. She just pushed the door open and saw me. I was there washing my hands and she said, oh, hello, Naydell, I haven't seen you in so long and good to see you, and I said – I looked at her and I said I'm sorry I don't recognize you, you know, and I didn't. I said what's your name and it was – I was kind of talking low and she was kind of talking loud and it was like she didn't hear what I was saying. And she just went ahead and made one more statement, and she said, "We sat (p. 31) through this whole case two years ago", I think is exactly what she said. I said, "Oh, I'm sorry, I can't talk about the case." And so we stopped it right there and –

THE COURT: And that's – she said nothing else that you remember? That's the substance of the conversation?

MRS. BELL: Yes. That was the entire remark that was said.

THE COURT: Then you left as you say and came and told the marshal about it?

MRS. BELL: Yes. That's correct. Uh hun.

THE COURT: Okay. All right. I'm going to talk to these lawyers and ask them if there's anymore questions. So we're not ganging up on you, but if you'll just stay right where you are, please.

MRS. BELL: Okay.

THE COURT: Why don't y'all come up here?

(Thereupon, an off-the-record discussion was held.)

THE COURT: Now, after you told the marshal about it as you've told us –

(p. 32) MRS. BELL: Uh-huh.

THE COURT: – and you related what happened –

MRS. BELL: Uh-huh.

THE COURT: – did you ever talk to any other – any person else about it that you recall, especially any other of you fellow jurors that day or any other time?

MRS. BELL: No. Absolutely not. I mentioned that an incident happened someone tried to talk to me and I just reported it to the marshal and I said and I can't say anymore, and I didn't say anymore ever, you know, because I felt really terrible that it happened.

THE COURT: During the – after all the evidence was in in the case after the Court had instructed you what the law was and y'all started you deliberations, was anything ever said about that incident during the deliberations?

MRS. BELL: No, sir. No, sir.

THE COURT: Okay. Where did you take Miss – is she out in our office?

MS. CLERK: Yes.

THE COURT: I'm going to put you in a room by yourself. I hate to be so silly. We'll tell

* * *

(p. 53) that all the questions concerning the bathroom scene?

MR. CROSSLEY: Well, if Your Honor please, I think that's all the questions of these witnesses, but it occurs to me that it would be appropriate for Your Honor to interrogate Mrs. Taylor who is here under subpoena, the lady who is said by Mrs. Bell to have talked to her to find out what Mrs. Taylor's interest, if any, was, what her relationship was to any witnesses.

THE COURT: Okay. Where is she? Where is she?

MR. CROSSLEY: She's out in the hall, I think, and Mrs. Blake according to Naydell Bell was in the room when this conversation occurred. I don't know whether you want her testimony for the record or not.

THE COURT: I don't care. She don't – she was there. She has told me she was there. Do y'all want – do you want her testimony or do you want to talk to her before you put her on or – well, not put her on, but –

MR. CROSSLEY: Sure. We'd like to have –

THE COURT: Mrs. Blake, why don't you (p. 54) stand up and raise your right hand.

(Whereupon, the witness was duly sworn.)

THE COURT: Okay. Have a seat in the witness stand. Now, you were in the ladies restroom at the same time that Mrs. Bell and this other woman, maybe a Mrs. Taylor, Mrs. Shaw Taylor was there, is that correct?

MRS. BLAKE: Yes.

THE COURT: What do you remember about the scene? Who was there when you came into the restroom; do you remember?

MRS. BLAKE: I don't know.

THE COURT: Okay. Just pick it up wherever you can remember it and tell us about it.

MRS. BLAKE: Well, all I can remember, there were women in there which I paid little or no attention to and I heard someone make the statement I have – or what I thought she said was, "I have sat through this entire trial," and then this lady which I recognize as Mrs. Bell today, she says I'm a juror in the case and I – don't say anything about the case. I'm a juror, don't say anything to me or words to that effect. And at that time they – Mrs. Bell left.

(p. 55) THE COURT: Did the woman quit talking to here then?

MRS. BLAKE: Yes. There was nothing else said after she said that.

THE COURT: Okay. Then who left? Mrs. Bell left first?

MRS. BLAKE: Yes.

THE COURT: And then you left?

MRS. BLAKE: And I left and I didn't pay any attention to – once she said that, it was over.

THE COURT: Okay. Anymore questions on that?

MR. CROSSLEY: No. Your Honor.

THE COURT: Okay. Come down. Now, you say Mrs. Shaw Taylor is here?

MR. CROSSLEY: We subpoenaed here, if Your Honor please, and would like to have the opportunity to take her testimony for the record.

THE COURT: Let me let you do that, but let me finish these jurors. We need to get into the second phase and that is – now, what exactly are you saying – now, which juror do you now say did nor correctly or forthrightly respond in the questions on voir dire and which questions did they

* * *

(p. 65) (Witness: Shaw Taylor)

THE COURT: What I'm doing is it's not going to be any harm for me to put it in the record and I don't want – if the Sixth Circuit sends this case back, I want to respectfully ask them to send a Judge down here with them to try it. Anyway, bring Mrs. Taylor around.

Mrs. Taylor, would you raise your right hand, please?

(Whereupon, the witness was duly sworn.)

THE COURT: Okay. Just have a seat, please, ma'am. All right, Mr. Crossley.

*EVA MEL TAYLOR,*

after being first duly sworn, testified as follows:

*DIRECT EXAMINATION*

*BY MR. CROSSLEY:*

Q Mrs. Taylor, my name is Bob Crossley and I represent A.O. Smith Harvestore Products, Inc.. I'm going to ask you a few questions if you don't mind. I appreciate you coming here in response to a subpoena. Would you state your name for the record, please?

A Eva Mel Taylor.

Q I'm sorry. Could you speak –

A Eva Mel Taylor.

(p. 66) Q Are you also known as Mrs. Shaw Taylor?

A (Witness moves head up and down.)

Q Okay. And if you would give audible answers. The court reporter is sometimes not looking at you and she needs to hear what your answer is –

A Okay.

Q – if you would. Thank you, ma'am. Where do you live, Mrs. Taylor?

A Winchester.

Q And would you mind stating your age for the record, please?

A 64.

Q Okay. Are you related to a Mr. Ed Taylor?

A Yes.

Q How are you kin to him?

A He's just by marriage. He's no blood kin.

Q Okay. Is he a nephew of your husband?

A Yes. sir.

Q Is that right? And he and his brother operate a dairy?

A That's right.

(p. 67) Q What is his brother's name?

A Charles.

Q And where is that dairy located?

A It's in Lincoln County. I don't know what town. It would be close to Fayetteville, I would think.

Q Okay. Mrs. Taylor, I believe that I observed you and a man who I – is that your husband who was here with you?

A Yes.

Q I believe I observed you and Mr. Taylor sitting here in the courtroom while the case of Jim and Kaaren Saylor was tried in June 1987?

A Yes, sir.

Q Were y'all here for most of the trial?

A Yes, sir.

Q Were you here for the entire trial?

A Of the – I don't remember if we was here every day.

Q Were you here on the first day?

A I can't say that. I don't know what day we were here.

Q Okay. But you were here for most of the days of the trial?

A Uh-huh.

(p. 68) Q You stayed here for the whole thing, stayed here – each day that you were here you stayed here for that entire day's proceedings; is that right?

A Yeah. We stayed the whole time we came. Uh-huh.

Q What was your interest in being here to listen to the Saylor trial in June 1987?

A No more interest than any other trial I go to.

Q Okay. Did you also attend –

THE COURT: Well, how many do you go to?

THE COURT: I've been to several up at the other courthouse, not no trial like this.

Q You mean the other courthouse, you mean the county courthouse?

A Yeah. Murder trials and different things like that.

Q Okay. Did Mr. Taylor go with you to those?

A Uh-huh. Yeah.

Q Did you also attend the trial in January of 1985 I think it was when Jim and Kaaren Saylor had their first trial against A.O. Smith?

(p. 69) A I don't remember the date, but I attended the trial.

Q Did you attend all of that first trial?

A Uh-huh.

Q Mrs. Taylor, you're acquainted I take it with the fact that your husband's nephew Ed Taylor and his brother have a lawsuit pending against A.O. Smith Harvestore Products?

A Yeah.

Q You're acquainted with that fact?

A (Witness moves head up and down.)

Q Is that so?

A Yeah.

Q Have you talked to your husband's nephews about that lawsuit?

A Well, not really what you – go into detail to talk about. I just knew that they said they has them sued for their silage spoiling.

Q Okay. Are you aware of the fact that suit that your husband's nephews have against A.O. Smith Harvestore is basically the same kind of suit as the Jim and Kaaren Saylor case?

A I'd think so.

Q Okay. Did you have a conversation in (p. 70) the ladies washroom with one of the women sitting on the jury in June 1987?

A I spoke to one of the jurors and she said, "I'm not supposed to talk." And I said, "I know that, I have sat through this trial before." And that's all that was said.

Q You sat through the Kaaren – Jim and Kaaren Saylor trial before –

A Uh-huh.

Q – is what you said before?

A I told her I knew I wasn't supposed to talk.

MR. VICK: Well, I object to the form of that last question. The witness said that I have sat through this

trial before and Mr. Crossley injected into his question the Jim and Kaaren Saylor trial.

THE COURT: Well, she'll have to answer the question. Overrule.

MR. CROSSLEY: She already has, Your Honor.

THE COURT: Okay.

*BY MR. CROSSLEY:*

Q Did you say anything to Mrs. Bell, the juror, about how that first trial had come out?

(p. 71) A No. She was in there and heard what I said.

Q Indicating Mrs. Blake?

A The juror was fixing to go out of the bathroom when I spoke to her and she was in there.

THE COURT: By she you mean the lady in the black suit?

THE WITNESS: Uh-huh.

THE COURT: Dixie Blake is the clerk.

THE WITNESS: I didn't know her name, but she heard what I said. She was in there. I don't know if she was listening.

Q Okay. Did you have an conversations with any other members of the jury?

A That's every word that was spoken. She left, went out of the restroom and I stayed in the restroom.

THE COURT: He's talking about the question did you ever talk to any other jurors –

THE WITNESS: Oh, no.

THE COURT: – other than Mrs. Bell?

THE WITNESS: No. She was just standing in the front of the restroom.

THE COURT: Wait until he asks another question.

(p. 72) *BY MR. CROSSLEY:*

Q Mrs. Taylor, I understand that you knew Mrs. Naydell Bell at some time in the past?

A When a young girl she went to the church I went to and she married and left Winchester and I never have seen her no more until up here.

Q Okay. Did you recognize her when you saw her sitting on the jury?

A Yeah. I did.

Q Do you have an conversations with Mrs. Bell during the time she was sitting on the jury other than the one you've described?

A No, sir. I didn't even know her name, her last name.

Q Okay. When was it –

THE COURT: How many years had it been – you say you knew here as a young girl.

THE WITNESS: Back when she went to church as a young –

THE COURT: You're still a young girl, I guess, but how –

THE WITNESS: No.

THE COURT: – how young a girl were you when you knew her?

THE WITNESS: She was a young girl.

(p. 73) THE COURT: Okay.

THE WITNESS: Naydell I guess –

THE COURT: How long has that been?

THE WITNESS: Oh, that's been 20 years, I guess.

THE COURT: Okay. Have you had any contact with her during that 20 years or had you seen her much before –

THE WITNESS: No. I never had seen her. She married somebody and moved away somewhere and I never had seen here no more until I saw her come in up here.

THE COURT: Okay.

*BY MR. CROSSLEY:*

Q the time when you went to church with her, that was a long time ago?

A Yeah. I'd say 20 years or maybe longer.

Q Okay. Do you know whether she still goes to that same church or –

A No. She don't go there. When she married I guess she left because I never did see her anymore. But I'm active in the church and I know I would see her if she was there.

MR. CROSSLEY: That's all, Your Honor.

(p. 74) THE COURT: You want to ask her anything, Mr. Vick, Mr. McCune?

*CROSS EXAMINATION*

*BY MR. VICK:*

Q Mrs. Taylor, when you made that comment to Mrs. Bell in the ladies room, tell the Court exactly as best you can recall what you said.

A I can tell you exactly to the word. I said, "Hi," and she said, "I'm not supposed to talk."

I said, "I know, I've sat through this trial before."

Q You did didn't use any names?

A (Witness moves head from side to side.) No. That's all I said to her.

Q You didn't use any names?

A I used her own name. I said Nadine and that's not her name.

Q Okay. But when you talk about this trial, you didn't refer to the Saylors?

A No. Huh-uh. It was no name of no trial mentioned. I just said, "I know, I've sat through this trial before."

THE COURT: All right. You're excused. You may go. Is there any reason I – do I

* * *

(p. 78) excused.

MR. VICK: May it please the Court, may we approach just one second before the jurors leave?

THE COURT: Before they leave? Wait just a minute here. Give me just a minute, please.

(Thereupon, an off-the-record discussion was held.)

THE COURT: All right. Excuse me. I was about to let you go. The five of you except Mrs. Bell go in the jury room. I won't keep you much longer. Thanks very much for your patience with me. I don't want to wear you out. Mrs. Bell, would you come back around, please, and Mr. Crossley here for the defendant, he's got some questions he wants to ask you further. Why don't you just ask her what you –

MR. CROSSLEY: All right.

*NAYDELL S. BELL,*
after being previously sworn, testified as follows:

*DIRECT EXAMINATION*

*BY MR. CROSSLEY:*

Q Mrs. Bell, after you had you conversation with Mrs. Taylor and she reminded you that she knew you 20, 30 years ago, did you after (p. 79) that remember that you knew her 20, 30 years ago?

A Oh, I didn't have a conversation with her. I realized later when I looked out in the courtroom and tried to figure out who that was, you know, because I didn't recognize her, you know, even after I left the restroom, I thought I recognized her husband who hadn't changed as much as she had and – and I was – you know, because he's a businessman here in town, was, I recognized him. I had no conversation. Then I knew I knew the Shaw Taylors from First Baptist Church in Winchester when I was growing up.

Q Okay. Excuse me. I misunderstood because I thought you had said earlier that she told you who she was and that you knew her 20, 30 years ago?

A No, sir. No. sir.

Q Okay. But you recognized her husband after that conversation and realized who he was?

A Yes.

A Okay. Did you also know Mr. Shaw Taylor's nephews, Ed Taylor and his brother, who operated a dairy farm in Lincoln County?

A No, sir, I did not and I still do not. I only know their son who also went to church (p. 80) with me.

Q Mr. Shaw Taylor's son?

A Right. That's the only relatives I knew of the Taylors because I was not close to them. I only knew them as a church member.

Q Okay. Back during the voir dire examination when the jurors were being asked questions before the jury was impaneled, the Court read off a list of the names of people who were going to be witnesses in the case.

A Uh-huh.

Q And I believe Ed Taylor was one of those names read off.

A I remember that name being read, yes, and I searched my mind do I know any Taylors in Lincoln County, I believe it was, and I did not, you know. I didn't know any Taylors other than here and, you know, I didn't

know any dairymen or I didn't know, you know – over the list you read, you know, I searched my mind do I know these people and I certainly did not.

Q Okay. Did you ever make a statement that you can now recall to any of the other jurors about who these people were who were sitting out here watching the trial? After you realized who (p. 81) that was, did you ever make any statement to any of the jurors about who they were?

A I – I don't recall saying that, you know, whether I – you know, I don't – I don't think I said anything about remembering who they might be. I don't think I – you know, that I went to church with them 20 years ago or anything. If I – you know, if I even said that statement, which I don't believe I did to them during the course of the case, I don't remember it. I didn't say anything that had to do with the case, I know that.

Q Okay. Did you at any time during the trial even up to the time that Ed Taylor testified ever make any connection between him and Mrs. Shaw Taylor?

A No, sir.

Q You were wholly unaware even at the end of the trial that he was related to here or to her husband?

A I was unaware of it, yes.

THE COURT: Okay. Mrs. Taylor – that's all. Is that all we have for her?

MR. CROSSLEY: Yes, Your Honor.

THE COURT: I mean, Mrs. Bell, you're excused. I want to thank you very much for your (p. 82) conscientious service on the jury. You did in the bathroom just exactly like I told you. I tell jurors that all the time and I tell people to do things all the time and I wonder if they do. You did what I told you to do. I said don't let anybody talk to you about this case, don't talk to anybody about it yourself and if they tell you – start to talk to you, tell them you're a juror and report it back to me. You did the whole thing. Thank you very much.

MRS. BELL: Thank you.

THE COURT: You're excused. Have you got her slip?

MS. CLERK: Yes, sir.

THE COURT: We'll pay you for being here. You may go.

MRS. BELL: I apologize to the Court, but it did not influence me in any way, I can assure both sides of that. It had no affect.

THE COURT: Okay. Thanks very much. Now, then, what do you want to do? Do you want to make – do you want to argue this further or do you want – you still want more time to put a brief in or what?

MR. CROSSLEY: Yes, Your Honor, we'd

* * *

# REPLY

# BRIEF

FILED
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(3)

No. 89-328

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**A.O. SMITH HARVESTORE PRODUCTS, INC., HERMITAGE HARVESTORE SYSTEMS, INC., and CHUCK DOWDY,**

*Petitioners,*

v.

**JAMES D. SAYLOR and KAAREN SAYLOR d/b/a UDDER NONSENSE DAIRY,**

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITIONERS' REPLY BRIEF

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No. 89-328

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**A.O. SMITH HARVESTORE PRODUCTS, INC., HERMITAGE HARVESTORE SYSTEMS, INC., and CHUCK DOWDY,**

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**JAMES D. SAYLOR and KAAREN SAYLOR d/b/a UDDER NONSENSE DAIRY,**

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITIONERS' REPLY BRIEF

The Petition establishes that there is a conflict in the circuits with respect to the application and continuing viability of the *Remmer* presumption of prejudice when a potentially prejudicial extraneous communication is made to a juror. The Petition similarly demonstrates that the Sixth Circuit's interpretation of Federal Rule of Evidence 606(b), defining the limits on questioning jurors about the effect of an outside communication, is in conflict with all other circuits which have addressed the issue.

The Respondents do not dispute these conflicts, nor do they quarrel with their importance and impact on civil and criminal litigants' fundamental right to a jury whose decision is based only on evidence admitted at trial. Instead, the Respondents argue that this is not the appropriate case to resolve those issues because the facts and not the legal issues were dispositive. Their argument is not only wrong, misleading, and largely unresponsive, but the so-called factual "finding of harmlessness" upon which they rely is: (1) not to be found in the decision below; and (2) begs the question since the issue before this Court is whether the Sixth Circuit erroneously failed to afford the Petitioners an evidentiary presumption of prejudice to which they were entitled.

## I. The Courts Below Did Not Hold That Petitioners Waived The Juror Misconduct Issue

Neither the District Court nor the Sixth Circuit found that the Petitioners waived their right to a postverdict inquiry of the jurors, nor their right to subsequently move for a new trial upon establishing that an outside communication regarding the prior trial was made by an interested spectator related to a witness for the Respondents.[1] As this Court has repeatedly said:

> [W]e "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

*Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301

[1] Indeed, had the District Court found a waiver, it never would have conducted the judicial inquiry. Likewise, had the Sixth Circuit held there was a waiver, there would have been no need for it to have reached the issue of whether *Phillips* effectively overruled the *Remmer* presumption.

U.S. 292, 307 (1937)). *Accord Barker v. Wingo*, 407 U.S. 514, 525-26 (1972).

In contrast to the cases relied upon by the Respondents,[2] the Petitioners were not advised of all of the facts surrounding the outside communication to the juror during the trial. (JA 87-89). Indeed, the Respondents are not being candid when they state that "no facts were withheld" and quote only from the affidavit submitted by the spectator, Mrs. Shaw Taylor. (Brief In Opposition at 3, 8).

Richard E. Herod, one of Petitioners' trial counsel, also submitted an affidavit to the District Court when it was considering whether to conduct the posttrial judicial inquiry. (JA 87). However, notably absent from the Respondents' Brief In Opposition is any mention of the fact that Petitioners' counsel was only able to speak to the spectator for less than one minute before trial reconvened. (JA 88). In fact it is telling that although the Respondents recite in full the spectator's affidavit they omit the following excerpts from Mr. Herod's affidavit:[3]

> 5. . . . Because the conversation was interrupted, I did not get an opportunity to obtain

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[2] *See* Brief In Opposition at 7-8 citing *United States v. Gersh*, 328 F.2d 460 (2d Cir.), *cert. denied*, 377 U.S. 992 (1964); *United States v. Shackleford*, 777 F.2d 1141 (6th Cir. 1985), *cert. denied*, 476 U.S. 1119 (1986); *United States v. Dean*, 667 F.2d 729 (8th Cir.), *cert. denied*, 436 U.S. 1006 (1982); *United States v. Bufalino*, 576 F.2d 446 (2d Cir.), *cert. denied*, 439 U.S. 928 (1978); *Nolan v. Nolan*, 97 F.R.D. 537 (S.D. W. Va. 1983).

[3] The entire affidavit is contained in the Appendix to this Reply Brief. It is also noteworthy that although the Respondents selectively reprint portions of the judicial inquiry in their Appendix to the Brief In Opposition, they do not reprint the entire transcript. The complete transcript is, however, contained in the two-volume Joint Appendix ("JA") which was filed with the Sixth Circuit and which the Petitioners have lodged with the Clerk of the Court.

> the identity of the spectator or to interview her regarding the full content of the conversation.
>
> 6. During my initial conversation with Mr. McCune [counsel for Respondents] and during the subsequent proceedings in chambers when Mr. McCune reported the incident, *he at no time identified the spectator as a person with whom he was acquainted or who was related to one of his clients, Ed Taylor, who testified in this case and who also has a claim against AOSHPI.*

(App. 2-3) (emphasis added).[4]

Thus, unaware that the spectator was not merely an uninterested observer but a relative of a witness who testified for the Respondents, who had filed his own lawsuit against the Petitioners, there was no waiver. *See United States v. Moten*, 582 F.2d 654 (2d Cir. 1978):

> *Gersh* is inapplicable here because at the time the government suggests that counsel should have sought further inquiry, counsel had been denied access to the *in camera* examinations. *If counsel had known*, for example, that Viola Intersimone had told the court that Keno had been talking to someone immediately before he approached her, *they may well have sought further inquiry*. In the circumstances, it cannot be said that there was a knowing and intelligent waiver.

*Id.* at 667 (emphasis added) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). As in *Moten*, had Petitioners' counsel

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[4] Moreover, the trial judge indicated at the judicial inquiry that he did not believe there was a waiver by observing that very little was known about the incident during trial:

> Well, they [Respondents' counsel] did report it to the Court. Let me put that in the record. I understood everybody made—*nobody knew much about it*, but a report was made by both of you in chambers that there was a conversation—I think the plaintiffs, you reported it.

(JA 506-07) (emphasis added).

been aware of the spectator's interest in the case, Respondents' counsel's knowledge of her identity and of her relationship to the Respondents' witness, counsel "may well have sought further inquiry." Since all of the facts were not known, there was no waiver. *Johnson*, 304 U.S. at 469; *Moten*, 582 F.2d at 667. Indeed, neither the District Court nor the Sixth Circuit so held.

## II. The Sixth Circuit Did Not Hold That The Communication Was "Harmless" Because It Did Not Apply The *Remmer* Rebuttable Presumption

Contrary to the Respondents' suggestion, the Sixth Circuit did not hold that the Petitioners failed to establish the requisites for the *Remmer* presumption or that the Respondents had successfully rebutted the presumption because they proved the contact was harmless. Rather, the Sixth Circuit explicitly held that the *Remmer* presumption no longer applies and the Petitioners failed to prove that the outside communication resulted in actual prejudice, stating:

> [I]f *Remmer* were controlling law, the burden would have been on the [Respondents] to establish lack of prejudice from the unauthorized contact. . . .
>
> * * *
>
> Because the holding in *Pennell* applies equally well to pre-verdict and post-verdict hearings for juror prejudice, *the defendants in this case bore the burden of proving that the extraneous juror contact resulted in actual prejudice. Since the defendants failed to carry that burden*, the district court did not abuse its discretion in denying their motion for a new trial on this ground.

(JA 437-38) (emphasis added).

Indeed, Respondents devote a large portion of their Brief In Opposition to responding to an argument that was not, and is not, asserted by the Petitioners—"due to the proscription of Rule 606(b) of the Federal Rules of Evidence, after a verdict has been returned by the jury, the presumption is conclusive." (Brief In Opposition at 9-10). Petitioners recognize that the *Remmer* presumption of prejudice is rebuttable and that it can be overcome, for instance, if the communication is proven to be harmless and did not contend otherwise in their Petition.[5]

The question presented, however, is not the effect of the *Remmer* presumption (i.e., rebuttable or conclusive) or whether it was rebutted in this case. Rather, the issue addressed by the Sixth Circuit and of which review is sought is whether the *Remmer* presumption is still viable. In other words, Petitioners do not contend that, absent the *Remmer* presumption, they proved actual prejudice. Rather, it is Petitioners' position that: (1) they were entitled to the presumption; and (2) for the policy reasons discussed in their Petition[6] the Respondents could not use the jurors' self-serving answer to the District Court's inquiry regarding the effect of the extraneous communication to rebut the presumption.

Similarly, the Respondents' argument that the District Court's finding of harmlessness is entitled to great weight and that it was not based on the question to the jurors regarding the effect on their verdict of learning of the prior trial is baseless.[7] (Brief In Opposition at 10-18). In-

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[5] *See* Petition at i, 9, 11. *See, e.g., United States v. Hornung*, 848 F.2d 1040, 1044-45 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 1349 (1989).

[6] *See* Petition at 18-19.

[7] Although the Respondents implicitly concede that this question violated Rule 606(b) and that the Sixth Circuit erred in its inter-

(Footnote continued on following page)

itially, it is telling that the Respondents' assertion, that "there was sufficient unquestionable admissible evidence . . . to show that the contact was harmless" without the question inquiring into the effect of the communication, is unsupported rhetoric. (Brief In Opposition at 9, 19, 20). Respondents do not point this Court to even one example of that evidence. The explanation for the omission is simple. There is no such evidence in the record.

The materiality to the trial judge of the jurors' assurances that they did not consider the effect of the outside communication regarding the first trial in reaching their verdict is readily revealed by the position taken by him prior to trial. Before the commencement of the second trial, he ruled that it would be prejudicial if the jurors learned that this case was being tried a second time:

> THE COURT: Yes, I don't want that done at all by anybody. It's not proper, and there is ab-

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[7] *continued*

pretation and application of Rule 606(b), they nonetheless assail the Petitioners' analysis of cases interpreting Rule 606(b), arguing that many of those cases involved "post-verdict hearings in which the circumstances surrounding the extraneous influence are inquired into." (Brief In Opposition at 11). What Respondents fail to comprehend, however, is that although the courts in those cases allowed the circumstances of the outside influence to be explored, they did not, as the trial court did here and as the Sixth Circuit approved, permit inquiry into the *effect* of the extraneous communication. *See, e.g., United States v. Hornung*, 848 F.2d 1040, 1045 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 1349 (1989) ("The court's questioning of a juror who is the recipient of extraneous information is limited to the circumstances and nature of the improper contact, as Fed. R. Evid. 606(b) precludes the court from delving into the subjective effect of the contact on the juror's decision-making."); *United States v. Delaney*, 732 F.2d 639, 643 n.6 (8th Cir. 1984) (juror's affidavits inadmissible to show how certain statements affected deliberations). *See also United States v. Bagnariol*, 665 F.2d 877, 889 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982); *United States v. Bassler*, 651 F.2d 600, 603 (8th Cir.), *cert. denied*, 454 U.S. 944 (1981).

> solutely no proper—the way it was tried before has nothing at all to do with what the judgment should be of this jury now, and we all—I am telling everybody to prevent that from happening at all cost . . .
>
> But I agree with that, and we all agree with that, and we all know that, *and I am saying now, everybody is enjoined from in anywise [sic] telling the jury anything as far as that goes.*

(JA 437-38) (emphasis added).[8] Accordingly, the District Court appropriately instructed the parties and their counsel to not inform the jury, in any manner whatsoever, of the *existence*, not merely the outcome, of the first trial.[9]

Finally, any lingering doubt about the impact of the question prohibited by Rule 606(b) is removed by the trial judge's own comments during the judicial inquiry in which he made it clear that he would consider the jurors' answer:

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[8] Thus, this is not a situation where the statement was innocuous on its face since the trial court had granted the motion in limine prohibiting any comments that would advise the jury of the first trial. Hence, the cases cited by Respondents are not apposite. (Brief In Opposition at 15-16 n.4).

[9] Indeed, in the small rural Tennessee community where both trials were conducted it is likely that most, if not all, of the jurors at the second trial had heard of a $1,000,000 verdict in favor of local farmers at the time of the first trial. Hence, when they learned that they were deciding the case for the second time, the jurors may well have concluded on their own that this is the same case which they heard about two years earlier and that it was the Respondents who had been the victors in the first trial. This is not, therefore, like the cases cited by Respondents such as *United States v. Butler*, 822 F.2d 1191, 1196 (D.C. Cir. 1987), where the communication "did not provide the juror with any crucial extrajudicial information," or *United States v. Bagnariol*, 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982), where there was no "direct and rational connection between the extrinsic material and prejudicial jury conclusion." *Id.* at 885.

> THE COURT: I'm fixing to ask these six jurors did they decide this case on the evidence they heard in this courtroom and on the law that I gave them and nothing else, *and I want to know what their answer is and if it's error, then we'll strike it from the record as though it didn't happen and you can correct the error when you get up to the Sixth Circuit*, but if I don't ask it they may send it back for me to ask them.

(JA 566) (emphasis added). The question was not stricken, however, by the Sixth Circuit. Nor did the Sixth Circuit believe the question was unnecessary to the trial judge's finding as the Respondents suggest in an attempt to deflect this Court's attention. Had that been the case, the Court of Appeals could have said so instead of adopting its strained interpretation of Rule 606(b) in conflict with other circuits in order to affirm the District Court. (Pet. App. 12-13). *See* Petition at 13-17.

## CONCLUSION

In sum, the Sixth Circuit's view, that the *Phillips* requirement that actual prejudice must be proven in a juror bias case has effectively overruled the *Remmer* presumption of prejudice in an extraneous contact case as applied to a postverdict hearing, is indisputably in conflict with all of the other courts of appeal to have considered the issue. Even the Respondents concede this point. Accordingly, they attempt to argue that the resolution of this important issue should not occur in this case because the Sixth Circuit's conclusion was fact driven. Their argument is simply not supported by the Sixth Circuit's decision. Rather, it was the Sixth Circuit's erroneous interpretation and application of this Court's decision in *Phillips* that resulted in the Petitioners being deprived of the

presumption of prejudice established in *Remmer*, and concomitantly the new trial to which they were entitled.

For the foregoing reasons and those set forth in the Petition, Petitioners respectfully submit that the issues presented are of such exceptional importance as to warrant review by this Court.

Dated: October 6, 1989

Respectfully submitted,

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# APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

| | |
|---|---|
| AGRISTOR LEASING, A Wisconsin Partnership,<br><br>Plaintiff<br><br>v.<br><br>JAMES SAYLOR AND wife, KAAREN SAYLOR, Individually and DBA "UDDER NONSENSE DAIRY",<br><br>Defendants, Counter-Plaintiff and Third-Party Plaintiffs<br><br>v.<br><br>A. O. SMITH CORPORATION; A. O. SMITH HARVESTORE PRODUCTS, INC.; HERMITAGE HARVESTORE SYSTEMS, INC.; AND CHUCK DOWDY,<br><br>Third-Party Defendants. | No. CIV-4-83-94<br>Jury Demand |

AFFIDAVIT

Comes the deponent, Richard E. Herod, and makes oath and states as follows:

1. That I am counsel for A. O. Smith Harvestore Products, Inc., a party defendant in the above-captioned ac-

tion; and that in said capacity I attended the trial of this case in June, 1987.

2. During a break in the trial of the above-captioned matter, I was approached by Malcolm McCune, counsel to the plaintiffs in this case. Mr. McCune advised that he needed an audience with the Court out of the presence of the jury to discuss a matter that had been brought to his attention by his client, Kaaren Saylor.

3. Upon inquiry, Mr. McCune stated that he had been advised that a conversation had taken place in the hearing of his client in the "ladies room" during that recess in which a spectator had told a member of the jury panel that she (the spectator) had attended the last trial. In this conversation, Mr. McCune identified the spectator only as a gray-haired lady who was in the courtroom with her husband during several days of the trial. Mr. McCune indicated that the conversation had involved the female juror who sat in the middle of the back row of the jury panel, Ms. Peggy Lawwell.

4. Following this conversation with Mr. McCune, I returned to the courtroom and went to speak with the spectator described by Mr. McCune. She was pleasant but extremely nervous and reluctant to speak to me. My conversation with her was interrupted when Judge Hull returned to the courtroom to reconvene the trial. I estimate that the entire conversation lasted less than one minute.

5. The only information that I was able to obtain from the lady was that she had in fact spoken with a member of the jury panel; that she was personally acquainted with that juror; and that she had stated to the juror that she had attended the first trial. Because the conversation was interrupted, I did not get an opportunity to obtain the identity of the spectator or to interview her regarding the full content of the conversation.

6. During my initial conversation with Mr. McCune and during the subsequent proceedings in chambers when Mr. McCune reported the incident, he at no time identified the spectator as a person with whom he was acquainted or who was related to one of his clients, Ed Taylor, who testified in this case and who also has a claim against AOSHPI.

7. Following the conclusion of the trial, I undertook to identify and locate this spectator for the purpose of discussing the proof presented at trial in an effort to evaluate the impact of the evidence upon an individual who I believed shared a similar demographic background to the jury panel. In the course of this endeavor, I learned that the spectator was related to Ed Taylor and was "very interested" in the litigation. I also learned that this individual was personally known to Mr. McCune, a fact which I confirmed in a telephone conversation with Mr. Tony Vick, who assisted him in the case.

The undersigned after being duly sworn states that the facts and statements contained in the foregoing are true and correct to the best of his knowledge and belief.

/s/ Richard E. Herod
Richard E. Herod

State of Tennessee )
)
County of Davidson )

Subscribed and sworn to before me this 16th day of October, 1987.

/s/ Suellen Douglas
Notary Public

My commission expires: 7-10-90